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Vol. I

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1939

No. 804

**THE SUNSHINE ANTHRACITE COAL COMPANY,
APPELLANT,**

vs.

**HOMER M. ADKINS, AS COLLECTOR OF INTERNAL
REVENUE FOR THE DISTRICT OF ARKANSAS**

**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE EASTERN DISTRICT OF ARKANSAS**

FILED MARCH 12, 1940.

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[fol. 1]

**IN UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF ARKANSAS, WESTERN
DIVISION**

In Equity No. 2949

THE SUNSHINE ANTHRACITE COAL COMPANY, Plaintiff,

vs.

**HOMER M. ADKINS, as Collector of Internal Revenue for the
District of Arkansas, Defendant**

COMPLAINT—Filed May 9, 1938

Paragraph 1.

Comes now the Sunshine Anthracite Coal Company, by its attorneys, and complains of Homer M. Adkins as Collector of Internal Revenue for the District of Arkansas, and for first paragraph of complaint alleges and says:

1. That plaintiff is a corporation duly organized, incorporated and existing under and by virtue of the laws of the State of Arkansas, with its principal office and place of business in Clarksville, Johnson County, State of Arkansas, and is engaged in the business of mining and shipping coal.

2. That this is an action in equity, and arises under the constitution and laws of the United States and under the laws of the United States providing for internal revenue, and in which there is an actual controversy between the plaintiff and the defendant in which the amount involved and in dispute exceeds the value of \$3,000.00 exclusive of interest and costs.

3. That plaintiff is the Lessee of four hundred acres of coal situate in Johnson County, State of Arkansas, on which it is erecting tipples, buildings and other structures, and is engaged in the business of mining and shipping coal, and that there is available and arrangements have been made for the plaintiff to lease an additional acreage up to approximately two thousand acres adjoining and [fol. 2] adjacent to the lands now held under lease by said plaintiff.

4. That the defendant, Homer M. Adkins, is a citizen of the State of Arkansas, residing in the City of Little Rock, Pulaski County, Arkansas, and is the duly appointed, qualified and acting Collector of Internal Revenue for the District of Arkansas, and as such Collector, collects all taxes, assessments and levies made or demanded to be made by the United States of America, which are collectible in Arkansas through the Internal Revenue Department.

5. That on the 26th day of April, 1937, the Congress of the United States at its 75th Session, enacted the Bituminous Coal Act of 1937 (50 Statutes at Large, 72 et seq.—U. S. C. A. Title 15, Sections 828-851 inc.). That by Section 3 of said Bituminous Coal Act of 1937, alleged excise taxes were levied as follows:

(a) There is hereby imposed upon the sale or other disposal of bituminous coal produced within the United States when sold or otherwise disposed of by producer thereof, an excise tax of one cent (1¢) per ton of two thousand pounds.

The term "disposal" as used in this section, includes consumption (or use whether in the production of coke or fuel or otherwise) by a producer, and any transfer of title by the producer other than by sale.

(b) In addition to the tax imposed by sub-section (a) of this section, there is hereby imposed upon the sale or other disposal of bituminous coal produced within the United States, when sold or otherwise disposed of by the producer thereof, which would be subject to the applications and conditions and provisions of the code provided for in sections 831-833, or of the provisions of section 834, an excise tax in an amount equal to $19\frac{1}{2}$ per centum of the sale price at the mine in the case of coal disposed of by sale at the mine, or in the case of coal disposed of otherwise than by sale at the mine, and sold otherwise than through an arm's length transaction, $19\frac{1}{2}$ per centum of the fair market value of such coal at the time of such disposal or sale. In the case of any producer who is a code member as provided in sections 831-833 and is so certified to the Commissioner of Internal Revenue by the Commission, the sale or disposal by such producer during the continuance of his membership of the code, of coal produced by him shall be exempt from the tax imposed by this sub-section.

[fol. 3] (c) The taxes imposed by this section shall be paid to the United States by the producer, and shall be payable monthly for each calendar month on or before the first business day of the second succeeding month under such regulations and in such manner as shall be prescribed by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury. (U. S. C. A. Title 15, Sec. 830.)

6. That said Bituminous Coal Act of 1937 in addition to the so-called taxes hereinabove set out, establishes the National Bituminous Coal Commission, subdivides the territory of the United States into districts, and provides for the organization of codes in the various districts, and fixes powers and duties of the coal commission in the District Boards, all of said act constituting a detailed scheme or method to control the production and distribution of bituminous coal produced in the United States of America by so-called code members and sold in interstate commerce, and the said National Bituminous Coal Commission, since its establishment under and by virtue of said law, has entered orders declaring that all bituminous coal sold, delivered, or offered for sale in intrastate commerce in the State of Arkansas and other states shall be subject to the provisions of the National Bituminous Coal Act of 1937; that said act purports to provide for voluntary membership in the codes established under and by virtue of the provisions of said act; that said act further defines the term "Bituminous Coal" as including all "bituminous, semi-bituminous, and sub-bituminous coal" and excludes from the operation of said act, all coal other than bituminous coal as thus defined; that said act by Section 7 thereof further provides that all provisions of law, including penalties and refunds, applicable with respect to the taxes imposed by Title IV of the Revenue Act of 1932 as amended, shall, insofar as applicable and not inconsistent with the provisions of this subchapter, be applicable with respect to taxes imposed under this subchapter.

7. That the plaintiff has not subscribed to nor accepted the provisions of the code promulgated by the National [fol. 4] Bituminous Coal Commission under the provisions of said act, and that plaintiff, therefore, is not a code member within the meaning of said act; that by reason of its

non-acceptance of said code and plaintiff's refusal to subscribe thereto, the plaintiff, in addition to being compelled to pay a tax of one cent on each ton sold, is subject to an additional tax of nineteen and one-half per centum of the sale price or the fair market value of the coal at the time of sale or disposal of the same.

8. That the plaintiff is engaged in developing a commercial mine for the purpose of producing coal from its coal mine property located in said Johnson County, Arkansas; that all of the coal produced at said mine is sold by this plaintiff f. o. b. mines; that said mine will, when fully developed, produce and market approximately one thousand tons of coal per day; that said mine is located in and produces coal from what is commonly known as the Spadra field, and mines and produces, and will mine and produce, a coal which has been sold on the open market for more than twenty years as Arkansas Anthracite coal; that said coal has never been either advertised or sold as bituminous, semi-bituminous or sub-bituminous coal; that prior to the development of the mine now in course of development, plaintiff for a long period of time operated a shaft mine on territory adjacent and contiguous to the mine now being developed, and producing the same quality and kind of coal and from the same seam as is now being produced and will be produced by plaintiff in the new development, and that said coal at all times has been sold and marketed as Arkansas Anthracite coal; that the coal produced at said mine is of a grade superior to coals commonly and generally sold as Bituminous or semi-bituminous or sub-bituminous coal, and has the characteristics of Anthracite or semi-anthracite coal, and that the coal produced by this plaintiff is not adapted to the uses commonly and generally made of bituminous or semi-bituminous or sub-bituminous coal, but is adapted to the uses commonly and generally [fol. 5] made of anthracite and semi-anthracite coal, and, therefore, plaintiff charges the fact to be that the coal produced and marketed by this plaintiff is neither bituminous, semi-bituminous nor sub-bituminous coal, and not within the purview of the act, and therefore, not subject to the alleged taxes levied and provided for under and by virtue of the terms of the National Bituminous Coal Act of 1937.

9. That plaintiff is producing at its mine in the process of development at the present time at the rate of approxi-

mately six thousand tons of coal per month, and that said coal so produced is now being sold at the approximate sale price of \$17,000.00 per month; that said sales will, in the course of the development of said mine, increase to approximately fifteen to twenty thousand tons per month and the realization from the sale of said coal will increase to approximately forty to fifty thousand dollars per month when and as the mine has been developed to its potential capacity.

10. That the alleged excise taxes attempted to be imposed upon this plaintiff by this defendant each month will amount at the present time to approximately \$2,500.00 per month, and will increase substantially each month as the development of said mine progresses, and will, if said alleged taxes are so imposed by defendant upon this plaintiff, eventually reach a maximum of six to eight thousand dollars per month; that said plaintiff has invested in the mine and machinery located upon said property an amount in excess of \$400,000.00, and that the profit realized and realizable on the gross sale price on the coal produced by it each month over the cost of production, and under prudent and economical operation, will not exceed ten per cent, and such profit is not less than the profit realized by the producers generally in the field where plaintiff's mine is located; that the profit thus realized would be totally inadequate and insufficient to pay the alleged excise taxes of one cent and nineteen and one-half per centum of the sale price, and [fol. 6] therefore, if plaintiff is required to pay said alleged taxes, plaintiff would of necessity operate said mine at a substantial loss each month, which would shortly aggregate a sum sufficient to render plaintiff insolvent and unable to operate its mine and produce and market coal, and would thus destroy, render of no value and confiscate the property of plaintiff and its investment therein; that the coal mined and removed by this plaintiff is not owned by plaintiff, but is under lease to plaintiff and under and by virtue of the terms of said lease plaintiff is required to pay royalty at twenty-five cents per ton for each ton of coal mined and produced, and by the terms of said lease, must produce a sufficient amount of coal to pay the owner a minimum royalty of \$5,000.00 per year, which said minimum royalty would be accumulated in the event said mine of plaintiff was not operated, and should plaintiff be compelled to close down its mine because of the imposition of the alleged excise

taxes, plaintiff would still be at a heavy expense in the upkeep of its properties and in the payment of said minimum royalty. Plaintiff further avers that substantially all of its capital and surplus is invested in the mine and equipment, and the only method by which it could possibly provide funds with which to pay said alleged excise taxes over a period of time would be to sell or dispose of its property, or to mortgage the same, and that said plaintiff under the circumstances would be unable to sell or dispose of said property or procure money by mortgage on said property; plaintiff further avers that it would be impossible for it to borrow money with which to pay the alleged excise taxes, for the reason that its operating statement would show a substantial loss, and for the further reason that mining property is not taken or considered as good security for loans under present market conditions; plaintiff further avers that the alleged 19½ per centum additional excise taxes on the sale price of coal is, in truth and in fact, a penalty [fol. 7] levied in such an enormous amount with the intended result of forcing this plaintiff to join and come under the code promulgated under said National Bituminous Coal Act; that plaintiff, if compelled to pay said alleged excise taxes each month, will be unable to continue the development and operation of said coal mine, and will be compelled to abandon said operation, thereby suffering immediate and irreparable injury.

11. Plaintiff further avers that the defendant herein, in violation of law, is threatening to and will unless restrained by this court, assess said alleged excise taxes against this plaintiff under and by virtue of the ~~tax~~ provisions of the Bituminous Coal Act of 1937, and is threatening to and will, unless restrained by this court, seize and sell the property of this plaintiff for the payment of said alleged excise taxes.

12. That Congress has made no appropriation out of which and with which to pay any judgment for refund which may ultimately be procured by plaintiff for so-called excise taxes and so-called additional excise taxes to be paid by the plaintiff to the said defendant upon the demand of said defendant, and it is entirely uncertain when plaintiff will be reimbursed on account of taxes exacted of it by the said defendant under and by virtue of the provisions of said act.

13. That the provisions of said National Bituminous Coal Act for refund are indefinite and uncertain; that the pen-

alties to which plaintiff may be and become liable on account of the alleged assessment of these alleged excise taxes are indefinite and uncertain; that refund of the alleged excise taxes, if paid, would be indefinite and uncertain as to time and could be recovered only after vexatious and long-draw-out litigation, and that a final adjudication of the liability of plaintiff herein for said alleged excise taxes and penalties could not be had and obtained prior to the First of March, 1939, and could not be had or obtained in time to prevent the involency of this plaintiff and the seizing [fol. 8] ing of its operations; that said alleged excise taxes are payable each month and plaintiff would be compelled to pay said taxes each month and to file claim for refund for each payment of said taxes and file various suits for return of said taxes; that if plaintiff is compelled to pay said alleged excise taxes until final adjudication, said taxes will be in an amount so large that it will be forced to close and abandon its mine and its leasehold interest will be forfeited by the owners thereof, and the property of plaintiff herein will be confiscated and destroyed and the plaintiff herein will lose its investment in said mine and be and become insolvent. Therefore, plaintiff charges the fact to be that plaintiff is without adequate remedy at law and is without remedy in the premises except in a court of equity.

Wherefore, plaintiff prays for the issuance of a temporary writ of injunction upon such terms as the court may deem just and proper restraining the defendant from enforcing or attempting to enforce against plaintiff the alleged liability for tax and so-called additional tax, and the alleged lien of the taxes against the plaintiff's property; that subpoena issue and be served upon the defendant as provided by law; that on final hearing the injunction be perpetuated, and that plaintiff have decree cancelling the claim of assessment of taxes against it, and for such other and further relief that it may be entitled to, conformable to the principles of equity and the practice of this court.

Paragraph 2

Comes now the plaintiff, and for second and further paragraph of complaint, complains of Homer M. Adkins, as Collector of Internal Revenue for the District of Arkansas, and alleges and says:

1. That plaintiff is a corporation duly incorporated, organized and existing under and by virtue of the laws of the

[fol. 9] State of Arkansas, with its principal office and place of business in Clarksville, Johnson County, State of Arkansas, and is engaged in the business of mining and shipping coal.

2. That this is an action in equity, and arises under the Constitution and laws of the United States and under the laws of the United States providing for internal revenue, and in which there is an actual controversy between the plaintiff and the defendant in which the amount involved and in dispute exceeds the value of \$3,000.00 exclusive of interest and costs.

3. That plaintiff is the Lessee of four hundred acres of coal situate in Johnson County, State of Arkansas, on which it is erecting tipples, buildings and other structures, and is engaged in the business of mining and shipping coal, and that there is available and arrangements have been made for the plaintiff to lease an additional acreage up to approximately two thousand acres adjoining and adjacent to the lands now held under lease by said plaintiff.

4. That the defendant, Homer M. Adkins, is a citizen of the State of Arkansas, residing in the City of Little Rock, Pulaski County, Arkansas, and is the duly appointed, qualified and acting Collector of Internal Revenue for the District of Arkansas, and as such Collector, collects all taxes, assessments and levies made or demanded to be made by the United States of America, which are collectible in Arkansas through the Internal Revenue Department.

5. That on the 26th day of April, 1937, there was enacted by the Congress of the United States at its 75th Session, the Bituminous Coal Act of 1937, (50 Statutes at L., 72 et seq. U. S. C. A. Title 15—Sections 828 to 851, Inc.).

6. That the provisions of said Act are substantially as follows, to-wit:

A. Section 1 is a declaration of the necessity for regulation of the sale and distribution of bituminous coal in interstate commerce.

Section 2 (A) establishes in the Department of the Interior a National Bituminous Coal Commission composed of seven members appointed by the President, by and with the advice and consent of the Senate, and fixes the terms,

qualifications, compensation, etc., of the members of the said commission. It also delegates to the commission the power to "make and promulgate all reasonable rules and regulations for carrying out the provisions of this sub-chapter;" provides for reports to Congress of the Commission's activities, and declares how many members of the Commission shall constitute a quorum. It further regulates the hearings and the fact finding power of the Commission; provides for divisions of the commission; for reference of matters to individual commissioners, employees or examiners for hearings and recommendations, gives judicial powers, and authorizes the making of contracts for personal services. It further authorizes the Commission to do such acts as it deems necessary and proper to promote the use of coal and its derivatives.

Section 2 (B) (1) establishes the office of the Consumers' Counsel of the National Bituminous Coal Commission, such counsel to be appointed by the President, by and with the advise and consent of the Senate, and fixes such counsel's qualifications and compensation.

Section 2 (B) (2) fixes the duties and powers of the aforesaid Consumer's Counsel.

Section 2 (B) (3) provides for the appointment and compensation of employees of the Consumers' Counsel.

Section 2 (B) (4) provides for reports of the Consumers' Counsel to Congress.

[fol. 11] Section 3 (A) imposes an excise tax of one (1) cent per ton of 2,000 pounds on the sale or other disposal, of all bituminous coal mined in the United States.

Section 3 (B) imposes an additional excise tax of 19½ per centum of the sale price (or market value in some cases) of coal sold or disposed of, but exempt from the payment of such tax "Code Members" as provided in Section 4, Parts I and II, of the Act.

Section 3 (C) provides that "taxes imposed by this section shall be paid to the United States by the producer, and shall be payable monthly for each calendar month on or before the first business day of the second succeeding month, under such regulations and in such manner as shall be pre-

scribed by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury."

Section 3 (D) provides for the determination of the market value of coal sold otherwise than through an arm's length transaction.

Section 3 (E) provides that the tax imposed by Section 3 (A) shall not apply when coal is sold for the exclusive use of the United States, any State or Territory thereof, or the District of Columbia, and provides for certain refunds and credits in such cases.

Section 3 (F) provides that no producer who accepts the code provided for in Section 4, parts I and II, shall be barred from contesting the provisions of the act, or the application of this act to him or coal produced by him.

Section 4 provides for the promulgation of the "Bituminous Coal Code" by the Commission, applicable solely to producers who become code members.

Section 4, Part I (A) requires the organization of twenty-three district boards of code members for each of twenty-three districts designated in an attached "Schedule of Districts" and outlines the method of selection of the members thereof, their terms, compensation and certain of their powers.

Section 4, Part I (B) provides for the assessment of code members to pay the expenses of administering the code.

Section 4, Part I (C) relieves the members and officers of the district boards from any connected liabilities except their "Own willful misfeasance or for non-feasance involving moral turpitude."

Section 4, Part I (D) exempts code members, district boards and officers from the prohibition of the anti-trust laws of the United States.

Section 4, Part II, gives the Commission the power to prescribe for code members only minimum and maximum prices, and marketing rules and regulations. It provides for the collection of data and statistics covering the preparation, cost, sale and distribution of coal; it designates minimum prices areas; provides for complaints to the Commission, and hearings and orders thereon; regulates coal sale con-

acts, and defines what acts shall be unfair methods of competition and shall constitute violations of the code.

Section 4-A provides for the determination by the Commission that Intrastate commerce in coal effects interstate coal and the subsequent regulations of such intrastate commerce under Section 4, Part-I and II. It also provides for hearings and exemptions on claims by producers that interstate commerce in coal is not subject to Section 4, Parts I and II.

Section 5 (A) provides for the acceptance of the code by producers.

Section 5 (B) provides for the revocation of membership of producers, and the revocation of the right to exemption from the tax imposed by Section 3 (B) after hearing on a charge of having violated the code.

Section 5 (C) provides for the restoration of members after conviction for code violations under Section (B).

Section 5 (D) provides for the recovery of treble damages and attorney's fees in civil suits by one code member against another where one is damaged by code violations on the part of the other.

Section 6 (A) provides for appeals from district boards to the Commission.

Section 6 (B) provides for appeals from the Commission to the United States Circuit Court of Appeals, or the United States Court of Appeals for the District of Columbia, and further appeals to the Supreme Court of the United States.

Section 6 (C) provides for the enforcement of the orders of the Commission through the Circuit Court of Appeals of the United States, and Section 6 (D) gives the said Circuit Court of Appeals exclusive jurisdiction in enforcing, setting aside and modifying orders of the Commission.

Section 7 applies the provisions of Title IV of the Revenue Act of 1932, as amended, insofar as applicable and not inconsistent, to the taxes imposed in this act.

Section 8 outlines the powers of the Commission and its members in the conduct of hearings, and the status of witnesses at such hearings.

Section 9 (A) states the public policy of the United States as to the rights of labor.

Section 9 (B) prevents the United States or its departments or agencies from purchasing coal produced in any mine where employees are denied the rights set forth in Section 9 (A).

Section 9 (C) provides that, after a hearing before the Commission, and a finding by the Commission, that any pro-[fol. 14] ducer supplying coal to the United States or an agency thereof is not complying with the principles stated in Section 9 (A), such contract for the purchase of coal shall be canceled and terminated.

Section 9 (D) provides that the provisions of this act shall not repeal or modify the provisions of the National Labor Relations Act, or any other act of Congress regarding labor relations.

Section 10 provides for the furnishing of statistical information to the Commission by code members; imposes penalties upon Commission officers or employees for unlawfully disclosing the information thus furnished, and imposes penalties upon code members failing to furnish information when required to do so.

Section 11 states: "state laws regulating the mining of coal not inconsistent herewith are not affected by this subchapter."

Section 12 provides that combinations between producers who are not code members, creating a marketing agency for competitive coals, shall be unlawful, and in restraining of trade; but that such combinations between code members, and under the provisions of the code, are legal. It provides for approval of such latter combinations by the Commission and for regulation of them by the Commission.

Section 13 is the separability clause.

Section 14 mandates the Commission to study and investigate the coal industry, and report its findings annually to the Secretary of Interior for transmission by him to Congress.

Section 15 provides for complaints to the Commission upon charges that prices fixed are excessive and oppressive,

or that any district board or marketing agency is operating against the public interest or in violation of the code.

Section 16 provides for appearance before the Interstate Commerce Commission, either as complainant or defendant, of the Commission or Consumers' Counsel, where coal rates are involved.

[fol. 15] Section 17 contains definitions of terms used in the act.

Section 18 designates the effective date of the Act.

Section 19 provides the term for which the Act shall be in effect.

Section 20 specifically repeals the Bituminous Coal Conservation Act of 1935, and makes available for the present Commission all records, property, equipment and appropriations of the Commission and Consumers' Counsel under the 1935 Act, and provides for appropriations of sums necessary for the administration of this Act.

Section 21 states, "This sub-chapter may be cited as the Bituminous Coal Act of 1937."

And annex to the Act contains the Schedule of Districts designated in Section 4, Part 1 (A).

7. That the plaintiff herein has not subscribed to nor accepted the provisions of the code promulgated by the National Bituminous Coal Commission under the provisions of the act, and is therefore, not a code member as defined in said act.

8. That by reason of its non-acceptance of said code and plaintiff's refusal to subscribe thereto, plaintiff, in addition to being compelled to pay a tax of one cent on each ton of coal sold, is liable for the so-called alleged additional tax and of nineteen and one-half per centum of the sale price or the fair market value of the coal at the time of the sale or disposal of the same.

9. That said tax is now accruing and has been accruing on all coal produced by the plaintiff since the first day of September, 1937, and that the defendant intends to levy said tax and attempt to enforce the collection of the same, in each and every month hereafter as said tax accrues.

[fol. 16] 10. That said additional tax imposed on the plaintiff by reason of not subscribing or accepting the provisions of said code is a penalty and not a tax.

11. That plaintiff is producing at its mine in the process of development at the present time at the rate of approximately six thousand tons of coal per month, and that said coal so produced is now being sold at the approximate sale price of \$15,000.00 per month; that said sale will, in the course of the development of said mine, increase to approximately fifteen to twenty thousand tons per month, and the realization from the sale of said coal will increase to approximately forty to fifty thousand dollars per month when and as the mine has been developed to its potential capacity.

12. That plaintiff's mine buildings, equipment and appliances are of the value of \$400,000.00.

13. That Congress has made no appropriation out of which and with which to pay any judgment for refund which may be ultimately secured by plaintiff for taxes to be paid by plaintiff under the provisions of the Act; and it is entirely uncertain when plaintiff will be reimbursed on account of taxes exacted of it under the provisions of the Act.

14. That the alleged excise taxes attempted to be imposed upon this plaintiff by this defendant each month will amount at the present time to approximately \$1,200.00 per month, and will increase substantially each month as the development of said mine progresses, and will, if said alleged taxes are so imposed by defendant upon this plaintiff, eventually reach a maximum of six to eight thousand dollars per month; that said plaintiff has invested in the mine and machinery located upon said property an amount in excess of four hundred thousand dollars (\$400,000.00), and that the profit realized and realizable on the gross sale price on the coal produced by it each month over the cost of production, and under prudent and economical operation, [fol. 17] will not exceed ten per cent, and such profit is not less than the profit realized by the producers generally in the field where plaintiff's mine is located; that the profit thus realized would be totally inadequate and insufficient to pay the alleged excise taxes of one per cent and nineteen and one-half per centum of the sale price, and therefore, if plaintiff is required to pay said alleged taxes, plaintiff would of necessity operate said mine at a substantial loss each

month, which would shortly aggregate a sum sufficient to render plaintiff insolvent and unable to operate its mine and produce and market coal, and would thus destroy, render of no value and confiscate the property of plaintiff and its investment therein; that the coal mined and removed by this plaintiff is not owned by plaintiff, but is under lease to plaintiff and under and by virtue of the terms of said lease plaintiff is required to pay royalty at twenty-five cents per ton for each ton of coal mined and produced, and by the terms of said lease, must produce a sufficient amount of coal to pay the owner a minimum royalty of \$5,000.00 per year, which said minimum royalty would be accumulated in the event said mine of plaintiff was not operated, and should plaintiff be compelled to close down its mine because of the imposition of the alleged excise taxes, plaintiff would still be at a heavy expense in the upkeep of its properties and in the payment of said minimum royalty. Plaintiff further avers that substantially all of its capital and surplus is invested in the mine and equipment, and the only method by which it could possibly provide funds with which to pay said alleged excise taxes over a period of time would be to sell or dispose of its property, or to mortgage the same, and that said plaintiff under the circumstances would be unable to sell or dispose of said property or procure money by mortgage on said property; plaintiff further avers that it would be impossible for it to borrow money with which to pay the alleged excise taxes, for the reason that its operating statement would show a substantial loss, and for the further reason that mining property is not taken [fol. 18] or considered as good security for loans under present market conditions; plaintiff further avers that the alleged 19½ per centum additional excise taxes on the sale price of coal is, in truth and in fact, a penalty levied in such an enormous amount with the intended result of forcing this plaintiff to join and come under the code promulgated under said National Bituminous Coal Act; plaintiff, is compelled to pay said alleged excise taxes each month, will be unable to continue the development and operation of said coal mine, and will be compelled to abandon said operation, thereby suffering immediate and irreparable injury.

15. That plaintiff is without adequate remedy at law and is without remedy in the premises except in a court of equity.

16. Plaintiff further avers that the defendant herein, in violation of law, is threatening to and will, unless restrained by this court, assess said alleged excise taxes against this plaintiff under and by virtue of the tax provisions of the Bituminous Coal Act of 1937, and is threatening to and will, unless restrained by this court, seize and sell the property of this plaintiff for the payment of said alleged excise taxes.

17. That on the 26th day of April, 1937, the Congress of the United States at its 75th Session, enacted the Bituminous Coal Act of 1937 (50 Statutes at Large, 72 et seq.—U. S. C. A. Title 15, Sections 828-851 inc.). That by Section 3 of said Bituminous Coal Act of 1937, alleged excise taxes were levied as follow-:

(a) There is hereby imposed upon the sale or other disposal of bituminous coal produced within the United States when sold or otherwise disposed of by producer thereof, an excise tax of one cent (1¢) per ton of two thousand pounds.

The term "disposal" as used in this section, includes consumption (or use whether in the production of coke or fuel or otherwise) by a producer, and any transfer of title by the producer other than by sale.

[fol. 19] (b) In addition to the tax imposed by sub-section (a) of this section, there is hereby imposed upon the sale or other disposal of bituminous coal produced within the United States when sold or otherwise disposed of by the producer thereof, which would be subject to the applications and conditions and provisions of the code provided for in sections 831-833, or of the provisions of section 834, an excise tax in an amount equal to $19\frac{1}{2}$ per centum of the sale price at the mine in the case of coal disposed of by sale at the mine, or in the case of coal disposed of otherwise than by sale at the mine, and coal sold otherwise than through an arm's length transaction, $19\frac{1}{2}$ per centum of the fair market value of such coal at the time of such disposal or sale. In the case of any producer who is a code member as provided in section 831-833 and is so certified to the Commissioner of Internal Revenue by the Commission, the sale or disposal by such producer during the continuance of his membership of the code, of coal produced by him shall be exempt from the tax imposed by this sub-section.

(c) The taxes imposed by this section shall be paid to the United States by the producer, and shall be payable monthly for such calendar month on or before the first business day of the second succeeding month under such regulations and in such manner as shall be prescribed by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury.

18. That said Bituminous Coal Act of 1937 in addition to the so-called taxes hereinabove set out, establishes the National Bituminous Coal Commission, subdivides the territory of the United States into districts, and provides for the organization of codes in the various districts, and fixes powers and duties of the coal commission in the District Boards, all of said act constituting a detailed scheme or method to control the production and distribution of bituminous coal produced in the United States of America by Code Members only and sold in interstate commerce, and the said National Bituminous Coal Commission, since the establishment under and by virtue of said law, had entered orders declaring that all bituminous coal sold, delivered, or offered for sale in intra-state commerce in the State of Arkansas and other states shall be subject to the provisions of the National Bituminous Coal Act of 1937; that said act purports to provide for voluntary membership in the codes established under and by virtue of the provisions of said [fol. 26] act; that said act further defines the term "Bituminous Coal" as including all "bituminous, semi-bituminous and sub-bituminous coal" and excludes from the operation of said act, all coal other than bituminous coal as thus defined; that said act by Section 7 thereof provides that all provisions of law, including penalties and refunds, applicable with respect to the taxes imposed by Title IV of the Revenue Act of 1932, as amended, shall, insofar as applicable and not inconsistent with the provisions of this sub-chapter, be applicable with respect to taxes imposed under this sub-chapter; that the regulation provided for by the code embraced in said act applied solely to those producers of bituminous coal who have accepted membership in the code provided for in said act.

19. That the plaintiff is engaged in developing a commercial mine for the purpose of producing coal from its coal mine property located in said Johnson County, Arkansas;

that all of the coal produced at said mine is sold by this plaintiff f. o. b. mines; that said mine will, when fully developed, produce and market approximately one thousand tons of coal per day; that said mine is located in and produces coal from what is commonly known as the Spadra field, and mines and produces, and will mine and produce, a coal which has been sold on the open market for more than twenty years as Arkansas Anthracite coal; that said coal has never been either advertised or sold as bituminous, semi-bituminous or sub-bituminous coal; that prior to the development of the mine now in course of development, plaintiff for a long period of time operated a shaft mine on territory adjacent and contiguous to the mine now being developed, and producing the same quality and kind of coal and from the same seam as is now being produced and will be produced by plaintiff in the new development, and that said coal at all times has been sold and marketed as Arkansas Anthracite coal; that the coal produced at said mine is of a grade superior to coals commonly and generally sold as [fol. 21] Bituminous or semi-bituminous or sub-bituminous coal, and has the characteristics of anthracite or semi-anthracite coal, and that the coal produced by this plaintiff is not adapted to the uses commonly and generally made of bituminous or semi-bituminous or sub-bituminous coal, but is adapted to the uses commonly and generally made of anthracite and semi-anthracite coal, and therefore, plaintiff charges the fact to be that the coal produced and marketed by this plaintiff is neither bituminous, semi-bituminous nor sub-bituminous coal, and not within the purview of the act, and therefore, not subject to the alleged taxes levied and provided for under and by virtue of the terms of the National Bituminous Coal Act of 1937.

20. That plaintiff is producing at its mine in the process of development at the present time at the rate of approximately six thousand tons of coal per month, and that said coal so produced is now being sold at the approximate sale price of \$15,000.00 per month; that said sale will, in the course of the development of said mine, increase to approximately fifteen to twenty thousand tons per month, and the realization from the sale of said coal will increase to approximately forty to fifty thousand dollars per month when and as the mine has been developed to its potential capacity.

21. That the provisions of said Act, known as the Bituminous Coal Act of 1937 are as applied to this plaintiff invalid, null and void in this, to-wit:

A. That it is beyond the power of Congress to legislate upon the business of producing and selling bituminous coal, as the business is a private one and not affected with a public interest.

B. That said Act constitutes an unwarranted delegation of the legislative function of the Congress of the United States.

C. That it deprives plaintiff of its property without due process of law in violation of the Fifth Amendment of the Constitution of the United States.

[fol. 22] D. That it constitutes an invasion by the government of the United States of America of rights and powers reserved to the several states by the Tenth Amendment to the Constitution of the United States.

E. That the additional tax imposed on plaintiff as a non-code producer and seller of coal is not a good faith exercise of the taxing power conferred upon Congress by Clause 1 of Section 8, Article 1 of the Constitution of the United States, but is an unconstitutional attempt by Congress to penalize plaintiff for not subscribing to or accepting the provisions of the code promulgated by the National Bituminous Coal Commission.

F. That said Bituminous Coal Act of 1937 is an arbitrary and unreasonable classification and attempts to regulate the sale and distribution in interstate commerce of that part of the bituminous coal produced in the United States by code members only and is in violation of the Fifth Amendment to the Constitution of the United States.

G. That said Bituminous Coal Act of 1937 attempts to levy a so-called excise tax in violation of Article 1, Section 8, Clause 1 of the Constitution of the United States.

22. Wherefore, the plaintiff is in need of equitable relief.

Wherefore, the plaintiff prays for the issuance of a temporary writ of injunction upon such terms as to the Court may seem proper, restraining the defendant from enforcing or attempting to enforce against plaintiff the al-

leged tax liability and the alleged lien against the plaintiff's property; that subpoena issue and be served upon the defendant as provided by law; that on final hearing the injunction be perpetuated; that plaintiff have decree cancelling the claim of assessment of taxes against it, and for such other and further relief as it may be entitled to, [fol. 23] conformable to the principles of equity and the practice of this Court.

(Signed) Adamson, Blair & Adamson, Terre Haute, Ind. (Signed) Patterson & Patterson, Clarksville, Ark.

[File endorsement omitted.]

[fol. 24] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION FOR PRELIMINARY INJUNCTION AND APPLICATION FOR DESIGNATION OF STATUTORY COURT—Filed May 9, 1938

Comes now the plaintiff, The Sunshine Anthracite Coal Company, and by reason of the facts set forth in its verified bill of complaint for injunction, heretofore filed, which facts constitute the grounds of this motion, and specifically by reason of the immediate, substantial, and irreparable damages described therein, all of which matters will be more fully established and proved by affidavits or exhibits and testimony, as the court may direct, at or before hearing upon this motion, moves this Court that a preliminary injunction be granted against the defendant after notice, pending the final determination of this suit, enjoining him as prayed in the bill of complaint for injunction.

And plaintiff further requests that the honorable judge before whom this motion comes will immediately call upon the senior Circuit Judge to designate two other judges to participate in hearing and determining the motion.

Adamson, Blair & Adamson, Terre Haute, Ind; Patterson & Patterson, Attorneys for Plaintiff.

[File endorsement omitted.]

[fol. 25] (Order designating three-judge court signed by Kimbrough Stone, senior Circuit Judge, omitted in printing.)

[fol. 26] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER—Filed May 31, 1938

Comes now the defendant Homer M. Adkins, Collector of Internal Revenue for the District of Arkansas, and for answer to the bill of complaint filed herein respectfully states:

1. Defendant admits the allegations of paragraph 1 of Part I of the bill of complaint.

2. Defendant admits the allegations of paragraph 2 of Part I of the bill of complaint.

3. Defendant admits that plaintiff is the lessee of coal lands in Johnson County, Arkansas, and is engaged in the business of mining and shipping coal. Defendant is without knowledge as to the remaining allegations of paragraph 3 of Part I of the bill of complaint.

4. Defendant admits the allegations of paragraph 4 of Part I of the bill of complaint.

5. Defendant admits the allegations of paragraph 5 of Part I of the bill of complaint.

6. For answer to paragraph 6 of Part I of the bill of complaint, defendant avers that the Bituminous Coal Act speaks for itself and that he is not required to answer the [fol. 27] allegations with respect to the contents thereof. Defendant admits that the National Bituminous Coal Commission has entered orders declaring that all bituminous coal sold, delivered, or offered for sale in intrastate commerce in the State of Arkansas and certain other States (but not all States) shall be subject to the provisions of the Bituminous Coal Act of 1937 inasmuch as such sales were found, after hearing, to directly affect interstate commerce.

7. Defendant admits the allegations of paragraph 7 of Part I of the bill of complaint.

8. Defendant admits that plaintiff has operated and operates a coal mine in Johnson County, Arkansas, in the Spadra Field. Defendant denies that the coal produced and marketed by plaintiff is neither bituminous, semi-bituminous, nor sub-bituminous coal, and avers on the contrary that the coal produced by plaintiff is within the purview of the Bituminous Coal Act and is subject to the taxes levied under said Act. Defendant is without knowledge as to the remaining allegations contained in paragraph 8 of Part I of the bill of complaint.

9. Defendant is without knowledge as to the allegations contained in paragraph 9 of Part I of the bill of complaint.

10. Defendant is without knowledge as to the allegations of fact contained in paragraph 10 of Part I of the bill of complaint. Defendant avers that the allegation that the 19½ per cent excise tax on the sale price of coal is a penalty levied in such an enormous amount with the intended result of forcing the plaintiff to join and come under the Code promulgated under the Bituminous Coal Act is a conclusion of law which defendant is not required to answer.

11. Defendant admits the allegations contained in paragraph 11 of Part I of the bill of complaint, except that defendant denies that his conduct is in violation of law.

12. For answer to paragraph 12 of Part I of the bill of [Vol. 28] complaint, defendant admits that it is uncertain exactly when plaintiff will be reimbursed on account of taxes exacted under the provisions of the Bituminous Coal Act. Defendant admits that Congress has made no specific appropriation for the payment of a refund to the plaintiff, but avers that each year an appropriation is made for the refund of all over-payments of taxes, whether determined administratively or by the courts, and that if plaintiff is held to be entitled to a refund of taxes paid under the Bituminous Coal Act such refund would be made.

13. Answering paragraph 13 of Part I of the bill of complaint, defendant admits that the time of the refund of any alleged excise taxes to plaintiff would be indefinite and uncertain, and that the excise taxes imposed by the Bituminous Coal Act are payable each month and that plaintiff would be compelled to pay said taxes each month, and to file claim for refund for each payment of said taxes and to file suits

for the return of said taxes (if plaintiff desired to have the taxes refunded), but defendant denies that plaintiff would have to file numerous suits for the return of said taxes. Defendant is without knowledge as to any of the remaining allegations of fact in the said paragraph 13, and avers that he is not required to make answer to the conclusions of law contained in the said paragraph.

For answer to Part II of the bill of complaint defendant respectfully states:

14. For answer to paragraphs 1, 2, 3, and 4 of Part II of the bill of complaint, defendant makes the same answer as to paragraphs 1, 2, 3, and 4 of Part I, respectively.

15. For answer to paragraphs 5 and 17 of Part II of the bill of complaint, defendant makes the same answer as to paragraph 5 of Part I of the bill of complaint.

16. For answer to paragraphs 6 and 18 of Part II of the bill of complaint, defendant makes the same answer as to paragraph 6 of Part I of the bill of complaint.

[fol. 29]/ 17. For answer to paragraphs 7 and 8 of Part II of the bill of complaint, defendant makes the same answer as to paragraph 7 of Part I of the bill of complaint.

18. Defendant admits the allegation contained in paragraph 9 of Part II of the bill of complaint.

19. Defendant avers that the allegation in paragraph 10 of Part II of the bill of complaint is a conclusion of law which he is not required to answer.

20. For answer to paragraphs 11 and 20 of Part II of the bill of complaint, defendant makes the same answer as to paragraph 9 of Part I of the bill of complaint.

21. Defendant is without knowledge as to the allegation contained in paragraph 12 of Part II of the bill of complaint.

22. For answer to paragraph 13 of Part II of the bill of complaint, defendant makes the same answer as to paragraph 12 of Part I of the bill of complaint.

23. For answer to paragraph 14 of Part II of the bill of complaint, defendant makes the same answer as to paragraph 10 of Part I of the bill of complaint.

24. Defendant avers that the allegations in paragraph 15 of Part II of the bill of complaint are allegations of law which he is not required to answer.

25. For answer to paragraph 16 of Part II of the bill of complaint, defendant makes the same answer as to paragraph 11 of Part I of the bill of complaint.

26. Answering paragraph 19 of Part II of the bill of complaint, defendant makes the same answer as to paragraph 8 of Part I of the bill of complaint.

27. Defendant denies the allegations of paragraph 21 of Part II of the bill of complaint, and avers that the Bituminous Coal Act of 1937 is in all respects constitutional.

[fol. 30] 28. Defendant avers that the allegation contained in paragraph 22 of Part II of the bill of complaint is a conclusion of law which he need not answer.

For affirmative answer to the bill of complaint herein defendant avers that:

29. Plaintiff produces and ships in interstate commerce bituminous and semi-bituminous coal, and accordingly is subject to the provisions of the Bituminous Coal Act of 1937.

30. Plaintiff on August 31, 1937, filed a petition for exemption from the Bituminous Coal Act of 1937 with the National Bituminous Coal Commission alleging that its coal was not subject to the provisions of the Act. Thereupon the National Bituminous Coal Commission on September 24, 1937, issued its Order No. 53 directing that a hearing be held before an examiner of the Commission in Fort Smith, Arkansas, on October 4, 1937, for the purpose of determining whether or not certain coals in the State of Arkansas are subject to the provisions of the Act and for the further purpose of hearing applications for exemption. Due and reasonable notice of said hearing was given all interested parties. The hearing was held at the time specified, the plaintiff, among others, being heard, and 493 pages of testimony was taken. On January 21, 1938, the examiner filed his report, proposed findings of fact and recommendations with the Commission, which were duly served upon all interested parties and the plaintiff. In his report, the examiner found that the coal produced by plaintiff was bituminous coal subject to the Act and recommended that the Commission deny the application for exemption. There-

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Upon, the plaintiff filed a motion with the Commission to withdraw its application for exemption, which motion was denied. On May 7, 1938, the Commission served on the parties to the proceeding, including plaintiff, its proposed report, in which it tentatively found that the coal produced by plaintiff is bituminous coal within the meaning of section 17(b) of the Bituminous Coal Act of 1937. The proposed report was accompanied by a notice stating that the parties might file exceptions thereto, and briefs, within thirty days, and also that they might request oral argument before the Commission, and that in the absence of the filing of exceptions the said proposed report would become effective as the report of the Commission at the expiration of the thirty-day period.

31. The said Bituminous Coal Act provides that any producer who is a code member and is so certified to the Commissioner of Internal Revenue is exempt from the 19½ per cent tax imposed by Section 3(b) of the said Act. The Act further provides in Section 3(f) that

No producer shall, by reason of his acceptance of the code provided for in section 4, or of the exemption from the tax provided in subsection (b) in this section, be held to be precluded or estopped from contesting the constitutionality of any provision of this Act or of the code, or the validity or application of either to him or to any part of the coal produced by him.

Plaintiff could have avoided the 19½ per cent tax imposed by Section 3(b), and the irreparable injury complained of as resulting from the effort of defendant to collect said tax, by accepting the code and contesting the application of the Act to plaintiff before the National Bituminous Coal Commission and the courts pursuant to the procedure established by the Act, without prejudicing plaintiff in any way.

32. Plaintiff has paid the tax of one cent per ton imposed by Section 3(a) of the Bituminous Coal Act for the months of September and October, 1937, and has filed a claim for the refund of the said taxes with the Commissioner of Internal Revenue. Plaintiff could have secured and can secure a prompt determination as to whether or not the Commissioner would grant said refund, and if the refund were denied, the plaintiff could bring a proceeding in the

proper United States district court for recovery of said [fol. 32] refund, in which proceeding plaintiff could obtain a determination as to whether or not it is subject to the Bituminous Coal Act. Plaintiff can protect itself against being forced to pay the 19½ per cent tax imposed by Section 3(b); until such time as its status is finally determined, by accepting the code established by Section 4 of said Act.

33. Plaintiff is not entitled to enjoin the collection of taxes, in view of Section 3224 of the Revised Statutes (26 U. S. C. § 1543).

Wherefore, having fully answered the bill of complaint, the defendant prays that the relief therein sought be denied and that said bill be dismissed with costs to the plaintiff and that defendant have such further orders, decrees and relief as may be just and equitable in the premises.

(S.) Fred A. Isgrig, United States Attorney, Eastern District of Arkansas. (S.) Robert L. Stern, Special Assistant to the Attorney General: (S.) Milton Carr Ferguson, Special Assistant to the General Counsel, National Bituminous Coal Commission.

[File endorsement omitted.]

[fol. 33] IN UNITED STATES DISTRICT COURT

[Title omitted]

TEMPORARY RESTRAINING ORDER—Filed June 3, 1938

Comes now the plaintiff herein by its attorneys, Henry Adamson and George O. Patterson, comes also the defendant herein, Homer M. Adkins, Collector of Internal Revenue, by Fred A. Isgrig, United States Attorney for the Eastern District of Arkansas, and this cause having been assigned now comes on to be heard. The case having been submitted upon the pleadings, stipulation and oral testimony and the Court being well and sufficiently advised on questions of law and fact arising herein, doth

Order, Adjudge and Decree that Homer M. Adkins, the Collector of Internal Revenue, should be and he is hereby enjoined and restrained from the collection of the excise tax

in the amount of nineteen and one-half per cent (19½%) as provided by Section 3(b) of the Bituminous Coal Act of 1937 heretofore assessed, and he is further restrained and enjoined from collecting or attempting to collect any excise tax or penalty which may be assessed pursuant to the said section of the Act.

This order shall remain in force and effect during the pendency of this litigation or until further orders of this Court.

Dated this 3rd day of June, 1938.

(Signed) J. D. Woodrough, Circuit Judge. (Signed)

Heartsill Ragon, District Judge. (Signed) Thomas

C. Trimble, District Judge.

[File endorsement omitted.]

[fol. 34] (Order granting leave to file supplement to answer omitted in printing.)

[fol. 35] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

SUPPLEMENT TO ANSWER—Filed August 28, 1939

Comes now the defendant, and for supplement to his answer to the bill of complaint filed herein, respectfully states:

30-A. Exceptions to the proposed report of the Commission were filed by plaintiff, and on July 7, 1938, counsel for plaintiff argued the case orally before the Commission. On August 31, 1938, the Commission rendered an opinion and findings and issued an order denying plaintiff's application for exemption and declaring the coal produced by plaintiff to be subject to the Act. A copy of the Commission's decision and order is attached hereto as Exhibit A. Plaintiff thereupon petitioned the Circuit Court of Appeals for the Eighth Circuit to review the order of the Commission, pursuant to the provisions of Section 4-A and 6(b) of the Bituminous Coal Act. After argument, on June 19, 1939, that court affirmed the order of the Commission. The circuit court of appeals held that the Commission had jurisdic-

tion to make the order, and that the order was lawful and supported by substantial evidence. A petition for rehearing filed by plaintiff was denied. A copy of the opinion of the circuit court of appeals is attached hereto as Exhibit B.

[fol. 36] 30-B. This court has no jurisdiction to review the Commission's order holding that coal produced by plaintiff is subject to the Bituminous Coal Act inasmuch as (1) that Act vests in the circuit courts of appeals exclusive jurisdiction to review orders of the National Bituminous Coal Commission and deprives the district courts of jurisdiction to review such orders, (2) the circuit court of appeals has jurisdiction, which it has exercised upon plaintiff's petition, to review the Commission's order holding coal produced by plaintiff subject to the Act, and (3) plaintiff has an adequate and complete remedy at law under the statute.

30-C. In the alternative, if this court should have jurisdiction to determine whether coal produced by plaintiff is subject to the Bituminous Coal Act, the court is bound by the findings made by the Commission on that question unless such findings are arbitrary, capricious, or unsupported by substantial evidence. The findings made by the Commission in the instant case are not arbitrary, capricious, or unsupported by substantial evidence.

Respectfully submitted, (S.) Sam Rorex, United States Attorney for the Eastern District of Arkansas. (S.) Robert E. Sher, (S.) Robert L. Stern, Special Assistants to the Attorney General, Counsel for Defendant.

August 7, 1939.

Service of above acknowledged. No objection to filing but do not agree as to sufficiency.

(S.) Henry Adamson, Counsel for Plaintiff.

[fol. 37] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION TO STRIKE OUT PART OF DEFENDANT'S ANSWER—
Filed December 22, 1939

Comes now the plaintiff in the above entitled cause of action, and separately and severally moves the court to

strike out and reject from defendant's answer herein each of the following allegations of defendant's answer:

1. That part of defendant's original answer designated Paragraph No. 30.
2. That part of defendant's original answer designated Paragraph No. 31.
3. That part of defendant's original answer designated Paragraph No. 32.
4. That part of defendant's original answer designated Paragraph No. 33.
5. That part of defendant's first supplemental answer designated Paragraph No. 34.
6. That part of defendant's first supplemental answer designated Paragraph No. 35.
7. That part of defendant's first supplemental answer designated Paragraph No. 36.
8. That part of defendant's first supplemental answer designated Paragraph No. 37.
- [fol. 38] 9. That part of defendant's second supplemental answer designated Paragraph 30-A.
10. That part of defendant's second supplemental answer designated Paragraph 30-B.
11. That part of defendant's second supplemental answer designated Paragraph 30-C.

For the reason that the matters and things alleged and contained in said paragraphs separately and severally considered are immaterial, impertenant and redundant and are insufficient to state a defense to plaintiff's cause of action herein.

Geo. O. Patterson, Henry Adamson, Attorneys for Plaintiff.

[File endorsement omitted.]

[fol. 39] (Order granting leave to file third paragraph of Complaint, omitted in printing.)

PARAGRAPH 3 OF COMPLAINT—Filed December 22, 1939

Comes now the plaintiff, and for third and further paragraph of complaint, complains of Homer M. Adkins, as Collector of Internal Revenue for the District of Arkansas, and alleges and says:

1. That plaintiff is a corporation duly incorporated, organized and existing under and by virtue of the laws of the State of Arkansas, with its principal office and place of business in Clarksville, Johnson County, State of Arkansas, and is engaged in the business of mining and shipping coal.

2. That this is an action in equity, and arises under the constitution and laws of the United States and under the laws of the United States providing for internal revenue, and in which there is an actual controversy between the plaintiff and the defendant in which the amount involved and in dispute exceeds the value of \$3,000.00, exclusive of interest and costs.

3. This plaintiff repeats and re-alleges as part of this cause of action, each and all of the allegations contained in paragraphs 3, 4, 5, 6, 9, 10, 11, 12 and 13, of paragraph 1 of this complaint, with like effect as if herein fully repeated, and incorporates herein all of the facts therein set forth.

4. That this plaintiff has not subscribed to nor accepted the provisions of the code promulgated by the National Bituminous Coal Commission under and by virtue of the provisions of the Bituminous Coal Act of 1937, and is, therefore, not a code member and not subject to the application [fol. 41] of the conditions and provisions of the code as provided for in said act, or of the provisions of Section 4-A of said Act.

5. That said subsection (b) of Section 3 of said Bituminous Coal Act of 1937, as set out in paragraph 4 of the first paragraph of plaintiff's complaint herein, purports to levy a 19½% tax or penalty on the sale price or value of bituminous coal, which would be subject to the application of the conditions and provisions of the code provided for in Sec-

tion 4 of the Act, or of the provisions of Section 4-A of the act; that the coal produced and sold by plaintiff herein is not subject to the application of the conditions and provisions of said code, or of the provisions of Section 4-A, as provided in Section 4 and Section 4-A of the said Bituminous Coal Act of 1937; that the coal produced and sold by plaintiff is, therefore, not subject to the tax or penalty imposed by said subsection (b) of Section 3 of the Bituminous Coal Act of 1937.

Wherefore, plaintiff prays that defendant be enjoined from enforcing or attempting to enforce against this plaintiff the alleged liability for the so-called additional tax or penalty, and the alleged lien of the additional tax or penalty against the plaintiff's property, and for such other and further relief as plaintiff may be entitled to, conformable to the principles of equity and the practice of this court.

(S.) Geo. O. Patterson, Henry Adamson, Attorneys
for Plaintiff.

[File endorsement omitted.]

[fol. 42] IN UNITED STATES DISTRICT COURT

Before Woodrough, Circuit Judge, and Trimble and Lemley,
District Judges

ORDER OVERRULING MOTION TO STRIKE—Filed January
8, 1940

This cause having been submitted to the three-judge court on a motion of plaintiff to strike part of the answer and supplemental answer, and the court, having considered the argument and briefs does deny and overrule the said motion in accordance with the opinion filed herewith.

(Signed) J. W. Woodrough, Thomas C. Trimble,
Harry J. Lemley.

January 6, 1940.

[File endorsement omitted.]

[fol. 43] IN UNITED STATES DISTRICT COURT FOR THE EAST-
ERN DISTRICT OF ARKANSAS, WESTERN DIVISION

In Equity. No. 2949

THE SUNSHINE ANTHRACITE COAL COMPANY, Plaintiff,

vs.

HOMER M. ADKINS, as Collector of Internal Revenue for the
District of Arkansas, Defendant

Before WOODROUGH, Circuit Judge, and TRIMBLE and LEM-
LEY, District Judges.

OPINION OVERRULING PLAINTIFF'S MOTION TO STRIKE PARTS OF
ANSWER AND SUPPLEMENTARY ANSWER—Filed March 4,
1940.

This case has been submitted to the three-judge court on the motion of the plaintiff to strike out those parts of the defendant's answer and supplemental answer which set forth the proceedings of the National Bituminous Coal Commission in which it was determined by the Commission that the underlying coal in certain counties of Arkansas, including the coal produced by the plaintiff, is bituminous coal within the meaning of the Bituminous Coal Act of April 26, 1937, 15 U. S. C. S. Sec. 828 et seq. and that the plaintiff is not entitled to exemption from the operation and effect of the Act and the subsequent proceedings on the appeal from such determination to this court, reported in 105 E. (2d) 559, and the application for and denial of certiorari by the Supreme Court November 6, 1939. The plaintiff's petition has been amended so as to include expended allegations to the effect that the coal produced by it is not bituminous coal within the meaning of Section 17 (b) of the Act, and in support of its motion it presents that it is entitled in this suit to have this court consider its evidence in support of these allegations and render its own judgment upon the issues joined thereon. Its position is that this [fol. 44] court is not finally bound by the determination of the Commission or the decision of the Court of Appeals on the review in that court to find as a fact that plaintiff's coal is bituminous coal within the meaning of the Act.

This suit is in equity against the Collector of Internal Revenue to enjoin him from collecting from the plaintiff the "tax" of 19½ per cent upon gross sales of its coal production, imposed by Section 3 of the Act against producers of bituminous coal moving in interstate commerce who do not become members of the Code. The suit is independent of the proceedings before the Commission and the appeal in the Circuit Court of Appeals, and it is an appropriate suit to test the validity as to the plaintiff of the imposition upon it of the "tax" of 19½ per cent upon its gross sales of coal. In considering and passing upon the present motion therefore this court will confine itself entirely to the question whether or not the status of the plaintiff as a producer of bituminous coal within the definition of Section 17 of the Act has been finally settled against the plaintiff by the determination and decisions pleaded by defendant.

This court's jurisdiction is that of a District Court and it is bound to follow unreversed and unmodified decision by the Circuit Court of Appeals of the circuit. When we turn to that court's opinion in *Sunshine Anthracite Coal Company v. National Bituminous Coal Commission*, we note the Court's conclusion was that Congress had delegated to the Commission the jurisdiction to determine for all administrative purposes of the Act, what coals were and what coals were not within the definitions and purview of the Act.

[fol. 45] The issue of the Commission's jurisdiction was squarely presented by the petitioner for review which is the party plaintiff in this case, and was directly passed on and decided by the court. It was contended "that the jurisdiction of the National Bituminous Coal Commission in fixing maximum and minimum prices, rules and regulations, is limited by the Act to coal producers who have accepted the code, and that as petitioner has not become a code member the Commission is given no power to hold a hearing and determine the class or kind of coal produced from petitioner's mines." It argues that "whether or not the coal it produces is bituminous, anthracite, semi-anthracite, lignitic or what not, is of no interest to the Commission until such time as the producer applies for membership in the code."

In answer to that contention "the Commission has rested its jurisdiction to determine whether petitioner's coal is bituminous within the meaning of the Act upon two separate and distinct bases: (1) Upon the general power of the Commission to make all reasonable rules and regulations for

carrying out the provisions of the Act and (2) upon the power to grant exemptions under Section 4-A."

The Court of Appeals decided the issue and said, "We, think the grounds of jurisdiction relied upon by the Commission are fully sustained." Further on in the opinion, the court said: "Here, where a determination of the character of coals in different parts of the country was a necessary incident to the performance of its other functions, the Commission was authorized to make the necessary determination." This court is bound to follow and apply the law so stated by the Circuit Court of Appeals.

But it is contended for the plaintiff, in support of the present motion, that its petition for review in the Circuit Court of Appeals was in an administrative proceeding in which such fact findings of the administrative body as were based upon substantial evidence were declared by the statute to be conclusive upon the court. The question whether plaintiff's coals are or are not bituminous is a question of fact and plaintiff asserts a right to the independent judgment of the court as to the fact.

The answer to the contention is that the Bituminous Coal Act, in conferring powers upon the Coal Commission and prescribing the duties to be performed by it, has made the discharge of many of the Commission's duties dependent upon its first making determination of the character of the underlying coals throughout the country and of the resultant status of those who produce the coals and engage in interstate commerce therein. The determination of the character of the coals could have been made by the Congress itself, or it could delegate the power. By the terms of the Act it conferred jurisdiction on the Commission to make the determination and the procedure provided for and followed by the Commission accorded to the plaintiff a full and fair hearing and a review in the Circuit Court of Appeals which satisfied all constitutional requirements as to determination of the fact question of the plaintiff's status in respect to the administration of the Act. The nature of the fact question as it would arise in many different parts of the country practically necessitated delegation of the power [fol. 47] to make determination to some such national body as the Coal Commission and precluded commitments if to the outcome of individual law suits in many courts.

It has not been decided whether the Collector may constitutionally enforce the collection of the "tax" of 19½

per cent against the plaintiff as provided in Section 3 of the Act, but the decision of the Court of Appeals that the Commission had jurisdiction to determine, and that it had rightly determined the status of the plaintiff as a producer of bituminous coal, necessarily implied that the determination was final and conclusive in the present suit. The decision of the Supreme Court in *Shields v. Utah Idaho R. Co.*, 305 U. S. 177, permits of no other conclusion by this court.

In that case, the Utah Central Railroad Company sought to enjoin the United States District Attorney and the United States from enforcing against it certain penal statutes which were not applicable to interurban electric railways. The railroad company claimed to be exempt from the operation of the statutes on the ground that it was an interurban electric railway, but in proceedings had before the Interstate Commerce Commission to which it was a party, the Commission determined that it was not. There had been no court review of the Commission's determination and the railroad company contended that it was entitled to the independent judgment of the court on the fact issue. The Circuit Court of Appeals in the Tenth Circuit, held that it was so entitled, but on appeal the Supreme Court said:

"What is the scope of the judicial review to which respondent is entitled? As Congress had constitutional authority to enact the requirements of the Railway Labor Act looking to the settlement of industrial disputes between carriers engaged in interstate commerce and their employees, and could include or except interurban carriers as it saw fit, no constitutional question is presented calling for the application of our decisions with respect to a trial de novo so far as the character of the respondent is concerned. With respect to that question, unlike the case presented in *United States v. Idaho*, 298 U. S. 105, where the Interstate Commerce Commission was denied the authority to determine the character of the trackage in question (*Id.* p. 107), the Commission in this instance was expressly directed to make the determination. As this authority was validly conferred upon the Commission, the question on judicial review would be simply whether the Commission had acted within its authority. *Interstate Commerce Commission v. Union Pacific R. Co.*, 222 U. S.

541, 547; *Interstate Commerce Commission v. Louisville & Nashville R. Co.*, 227 U. S. 88, 91; *Virginia Railway Co. v. United States*, 272 U. S. 658, 663; *Tagg Bros. & Moorhead v. United States*, 280 U. S. 420, 444; *Florida v. United States*, 292 U. S. 1, 12; *St. Joseph Stock Yards Co. v. United States*, *supra*.

"The condition which Congress imposed was that the Commission should make its determination after hearing. There is no question that the Commission did give a hearing. Respondent appeared and the evidence which it offered was received and considered. The sole remaining question would be whether the Commission in arriving at its determination departed from the applicable rules of law and whether its finding had a basis in substantial evidence or was arbitrary and capricious." *Id.*

It will be observed that the Supreme Court distinguished, as we must do here, between the fact question of character (or status) of the plaintiff in the suit for injunction which it had brought against the District Attorney, et al., and a question of constitutional right. We recognize fully that the plaintiff here, notwithstanding it is a producer of bituminous coal, has the right to contest payment of the 19½ per cent "tax" of Section 3 of the Act. Whether enforcement of that "tax" will or will not deprive it of constitutional rights remains to be litigated herein. But the Supreme Court has left no room to argue that this court has jurisdiction to try *de novo* the fact question as to the status of the plaintiff under the Coal Act or the character of the coal it produces.

[fol. 49]. The Supreme Court's decision also precludes our reconsideration in this case of the evidence taken in the prior proceedings. That evidence was fully considered by the Circuit Court of Appeals and it was decided by that court that the Commission "in arriving at its determination had not departed from the applicable rules of law", and that "its findings had a basis in substantial evidence and were not arbitrary or capricious." Such is the full limit of judicial review of the fact findings of an administrative tribunal when made within the scope of its jurisdiction which the Supreme Court recognizes even in the absence of an express statute.

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We think the Supreme Court's commitment to such support of administrative determinations of fact questions made within the powers lawfully delegated to them is also clearly shown in the other recent cases. *Rochester Telephone Co. v. United States*, 307 U. S. 125, 145; *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 49; *Anniston Mfg. Co. v. Davis*, 301 U. S. 337.

The Bituminous Coal Act contains the express provision Section 6 (b) (d) that where a petition to review is filed in a Circuit Court of Appeals, the Commission shall file therein a transcript of the record and thereupon "such court shall have exclusive jurisdiction to affirm, modify and enforce or set aside (the order reviewed) in whole or in part." Section 6 (d) provides:

"(d) The jurisdiction of the Circuit Court of Appeals of the United States or the United States Circuit Court of Appeals for the District of Columbia, as the case may be, to enforce, set aside, or modify orders of the Commission shall be exclusive."

And in Section 6 (b), Congress provided that where a petition to review is filed in a Circuit Court of Appeals, the Commission shall file therein a transcript of the record, and thereupon "such Court shall have exclusive jurisdiction to affirm, modify, and enforce or set aside such order, in whole or in part." The contentions of plaintiff that the fact question has not been settled against it either because its present action is an independent one or because there was a different object in the prior proceedings or because those proceedings were for limited purposes, cannot be sustained.

As to the parties. Another contention of the plaintiff in support of the ~~present~~ motion is that the parties to the present suit are not the same as in the former proceedings in that here the Collector of Internal Revenue is defendant and there the Coal Commission was respondent to the petition for review in the Circuit Court of Appeals.

In considering this connection it is observed that the powers conferred upon the Secretary of the Treasury and the Commissioner of Internal Revenue (and subordinately upon the Collector) in respect to the "tax" of Section 3 of the Bituminous Coal Act threatened to be enforced against plaintiff are dependent upon the determination of the plain-

tiff's status by the Commission and the Court of Appeals. The Commission and the Court are given the exclusive power to make that determination and have exercised the jurisdiction. The "tax", if any is due or enforceable, is due to the United States. To the extent that the Commission has been entrusted with powers affecting the "tax" therefor, it is an agency of the United States, and to the extent that powers have been conferred upon the Collector and his superior officers, they are also agencies of the United States. It results from the paramount and sole interest of the United States that when a valid determination has been made between a party and an officer or agency [fol. 51] of the United States in official capacity, it is conclusive between the party and any other of the government authorized as an agency of the government in respect to the same matter. *New Orleans v. Citizens Bank*, 167 U. S. 371, 388-389; *Bank of Kentucky v. Stone*, 88 Fed. 384, 395 (C. C. D. Ky.), affirmed 174 U. S. 799; *Gunter v. Atlantic Coast Line*, 200 U. S. 273, 284 ff; *Tait v. Western Maryland Ry. Co.*, 289 U. S. 620, 626-627.

In the case of *Shields v. Utah Idaho R. Co.*, supra, from which we have quoted the situation in regard to the parties was the same as is here presented. There the United States District Attorney was the party defendant who threatened to take action against the plaintiff, as does the Collector in this suit. The injunction that was issued in the lower courts ran against the District Attorney. The fact that the Interstate Commerce Commission intervened in the case did not affect the situation. Although no question as to the identity of the parties to the estoppel of the Commission's determination was discussed by the Supreme Court, this court would not be at liberty to render decision at variance with that announced by the Supreme Court in the completely analogous situation.

We have given careful consideration to the earlier Supreme Court decisions cited and relied upon by plaintiff in support of its motion, including *State Corporation Commission of Kansas v. Wichita Gas Co.*, 290 U. S. 561, 78 L. Ed. 500-504; *B. & O. Ry. Co. v. United States*, 298 U. S. 349, 80 L. Ed. 1209-1224; *United Gas Public Service Co. v. Texas*, [fol. 52] 303 U. S. 123, 82 L. Ed. 702-711; *Crowell v. Benson*, 285 U. S. 22, 76 L. Ed. 598; *South Chicago Coal & Dock Co. v. Bassett*, 104 F. (2d) 522-525 (C. C. A. 7); *Ohio Valley Water Co. v. Ben Avon*, 253 U. S. 287, 64 L. Ed. 908-914. It

may be conceded that different views have been expressed to the effect to be given in the courts to the determinations of administrative bodies under the varying circumstances presented in the adjudicated cases. No good purpose would be served by attempting a review of them in this opinion. One of those referred to would justify a refusal to follow those late decisions upon which we have relied.

We conclude that the plaintiff's motion to strike out the parts of defendant's and supplemental answer referred to in the motion should be denied and we so order.

Upon the pleadings now presented the finding of the court could be that the plaintiff was a producer of bituminous coal within the meaning of the Act at the times in the petition referred to, and the court would receive no testimony offered to the contrary.

But our ruling on the motion is made with full recognition of the right of the plaintiff to litigate the issues as to the validity or application of the statutory provisions concerning the "tax" or the rights which the plaintiff as a non-code member producer of bituminous may have in regard to the same.

[File endorsement omitted.]

[Vols. 53-54] IN UNITED STATES DISTRICT COURT

SUPPLEMENTAL ANSWER—Filed Feb. 5, 1940

Comes now the defendant, Homer M. Adkins, Collector of Internal Revenue for the District of Arkansas, and for answer to the third part of the bill of complaint respectfully states:

1. Defendant admits the allegations of paragraph 1 of Part 3 of the bill of complaint.
2. Defendant admits the allegations of paragraph 2 of Part 3 of the bill of complaint.
3. Defendants repeats and re-alleges all of the allegations contained in the answer heretofore filed in response to paragraphs 3, 4, 5, 6, 9, 10, 11, 12, and 13 of Part 1 of the complaint, with like effect as if herein fully repeated.

4. In answer to paragraph 4, defendant admits that plaintiff has not subscribed to nor accepted the provisions of the Bituminous Coal Code. Defendant avers that he is not required to make answer to the remaining allegations of this paragraph, which are conclusions of law.

5. In answer to paragraph 5, defendant avers that he is not required to make answer to this paragraph, which contains only conclusions of law.

Wherefore, defendant prays that the relief sought in the bill of complaint be denied and that said bill be dismissed with costs to plaintiff and that defendant have such further orders, decrees, and relief as may be just and equitable in the premises.

(Signed) Robert E. Sher, (Signed) Robert L. Stern,
(Signed) Harold Leventhal.

[File endorsement omitted.]

[fol. 55] IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF ARKANSAS, WESTERN DIVISION

In Equity No. 2949

THE SUNSHINE ANTHRACITE COAL COMPANY, Plaintiff,

vs.

HOMER M. ADKINS, as Collector of Internal Revenue for the District of Arkansas, Defendant

MEMORANDUM OPINION—Filed Feb. 16, 1940

The Court:

We have concluded to avoid the delay that would be entailed by the preparation of a formal opinion in this case, notwithstanding the great importance of the questions presented, because of the comprehensive discussions and analyses of the Bituminous Coal Act and the Act preceding it promulgated in the Carter Coal Company case and in the City of Atlanta vs. Commissioner. We are in accord with the opinion in the latter case and the citations generally control the decision here except as to the specific matter of the 19½ per cent tax of Section 3 (b).

We feel that in this case that we had the benefit of an unusually helpful oral argument in that it seems that the vital and determinative questions were clearly presented and with immediate reference to the decided cases that tended to sustain the various contentions that were made.

Now, we have had submitted to us the proposed and requested findings, we have carefully gone over those requested by the plaintiff and in our determination of the case we find no one of these requested findings that are necessary to sustain the conclusions we have arrived at, or necessary to reflect the testimony in the case. There are some that are incorporated in the findings which we shall adopt and we see no occasion for repetition. All the essential matter that we find should be determined upon the testimony we think is included and properly set forth in the findings that have been submitted on behalf of the defendant together with those additional findings which we have made ourselves. On carefully checking over and examining [fol. 56] the proposed findings for the Government, we have made some addition and corrections particularly as to the matter of the state of the plaintiff's property and the value of its assets, etc. The plaintiff has not requested specific detailed findings in that regard, nor do we think it necessary to amplify the matter very much. It has been requested that we find that the plaintiff is the lessee of coal lands in Johnson County, Arkansas, owned by the Ozark Coal Company and leased to plaintiff, under a lease which originally required plaintiff to pay a royalty of twenty-five cents per ton for each ton of coal mined and removed but not less than \$5,000.00 per year. By a supplemental agreement, the royalty has been reduced to fifteen cents a ton while the mine is in the development stage, the minimum royalty still continuing at \$5,000.00 per year. And that part of the finding appears to us to be properly in accord with the allegations and the testimony.

The plaintiff's property is in the development stage at the present time. The tonnage produced and sold has been increased from year to year. In 1939 it was in excess of one hundred thousand tons. There may be a slight inaccuracy in that. There was testimony that between 1937 and 1938 there had not been very much change. The property of the plaintiff is carried on its books at a figure in excess of \$500,000.00 but it is very heavily encumbered. In

part, because of the depressed condition of the bituminous coal industry, plaintiff is unable at present to find a purchaser for its property in a free and open market or to borrow money thereon from the bank. And then we have the fact that plaintiff's property has been operated at a loss for the past three years and the actual sale value of its property does not exceed \$30,000.00. Now there were [fol. 57] further findings including a finding of the formal matters on which there has been no controversy as to amount of taxes which the defendant has assumed and purported to lay against plaintiff and the dates, manner and so forth, and that the production has continued. The historical matter copied in the stipulation as to the state of the industry has been repeated in the findings; we find that substantially correct except one request was made by the Government for us to find, "That another effect of the situation was that the operators wasted the best of the nation's coal reserve because they were cheap and readily available." We find no testimony directed to that point exactly and we decline to make that finding. Otherwise, the formal matters in the finding are in direct conformity, we think, with the evidence. There is a finding of the effect of the proceedings that have been had before the Commission and before the Appellate Court, as to which we have already indicated, our opinion in writing and the finding here correctly recites the facts of those proceedings.

As to our conclusions of law, we make the formal jurisdictional conclusions. We have a certain jurisdiction, but we do not have jurisdiction to go into the questions already adjudicated by the Commission and by the Court of Appeals. We conclude that the Act is constitutional, that the regulatory provisions are valid exercises of the power of Congress to regulate commerce, that the procedure for the establishment of prices is within the Constitutional power and sufficient definite standards are indicated. We do not pass on the question of nomenclature of the section that is sought to be given by the plaintiff whether this is a tax or a penalty, but we find it is germane to and adapted to carrying out the purpose of the Act and within the scope of the power of Congress to enact. Now, outside of these [fol. 58] findings that have been requested, we have made this finding which is directly, particularly directed to the final order that ought to be entered in this case. It appears

to us from the record that the coal company filed its claim for exemption August 31, 1938. The Circuit Court of Appeals affirmed by opinion June 19, 1939. The Supreme Court denied certiorari November 6, 1939. Rehearing was denied by the Supreme Court December 4, 1939. Throughout the period no schedule of prices had been established by the District Board.

The statute Sec. 4-A Paragraph 2 (p. 13) provides that the filing of an application in good faith "shall exempt the applicant from any obligation, duty or liability imposed by Section 4 with respect to the commerce until such time as the Commission shall act upon the application". The exemption may be suspended if there is reason to believe that the exemption during the litigation "is likely to permit evasion of the Act" *id.*

So-called taxes and penalties were attempted to be applied to plaintiff beginning in March, 1938, and running through September, 1939. Although the statute describes the exemption period by reason of the presentation of application for exemption in good faith as extending to the time when the Commission "shall act" thereon, the extent of such exemption is also qualified by exercise of discretion when it appears "likely to permit evasion of the Act". The test may fairly be said to be the likelihood of such evasion. The due process for protection of plaintiff's rights is accorded by the opportunity for hearing before the Commission and the hearing by the Court of Appeals on appeal. Together, the procedure before the Commission and the court satisfies the due process requirements. We conclude that the discretion vested in the Commission by necessary [fol. 59] implication also resides in the court. We think that plaintiff's claim for exemption has been made and diligently prosecuted without delay in good faith and that in view of the fact that no price schedule has been established the plaintiff was in this case entitled to be exempted from the 19½ per cent exaction of the statute until the final action of the Supreme Court denying rehearing on its ruling on certiorari on December 4, 1939. As to the taxes laid and attempted to be collected by defendant under the 19½ per centum provision of the Act prior to said date of December 4, 1939, therefore, the plaintiff is entitled to the injunction prayed for. "It is decreed that such taxes up to that time are null and void and their assertion or collection is enjoined."

But from and after said date plaintiff has ceased to be exempt by reason of its application for exemption and litigation in support of such claim. Its bill in equity herein seeking to enjoin defendant from assessing and collecting the amount of 19½ per centum of the sale price of its coals from and after December 4, 1939, is without equity and is dismissed.

But notwithstanding such dismissal, the restraining order heretofore entered herein shall remain operative to prevent assertion or collection of such taxes by defendant for the period of thirty days from the entry hereof to enable the plaintiff to appeal to the Supreme Court. If the plaintiff shall perfect such appeal in said court within said period, the restraining order shall remain in force and shall operate to stay our decree until final disposition of the appeal in the Supreme Court; otherwise it shall cease to be operative and shall stand revoked at the end of said thirty day period.

Now that seems to us sufficient basis for the clerk to enter a decree in conformity with our decision.

[File endorsement omitted.]

[fol. 60] Clerk's Certificate to foregoing paper omitted in printing.

[fol. 61] IN UNITED STATES DISTRICT COURT

Findings of Fact and Conclusions of Law—Filed February 16, 1940

This cause having been assigned for trial on February 15, 1940, trial was had, evidence heard and arguments of counsel presented, and the court now files herein its findings of fact and conclusions of law thereon.

FINDINGS OF FACT

1. Plaintiff, The Sunshine Anthracite Coal Company, is a corporation duly organized, incorporated and existing under and by virtue of the laws of the State of Arkansas, with its principal office and place of business in Clarksville,

Johnson County, State of Arkansas, and is engaged in the business of mining and shipping coal.

2. The defendant, Homer M. Adkins, is the duly appointed, qualified and acting Collector of Internal Revenue for the District of Arkansas, and as such Collector, collects all taxes, assessments and levies made or demanded to be made by the United States of America, which are collectible in Arkansas through the Internal Revenue Department.

3. Plaintiff is the lessee of coal lands in Johnson County, Arkansas, owned by the Ozark Coal Company and leased to plaintiff under a lease which originally required plaintiff to pay a royalty of twenty-five cents per ton for each ton of coal mined and removed, but not less than \$5,000 per year. By a supplemental agreement the royalty has been reduced to fifteen cents per ton while the mine is in the development [fol. 62] stage, the minimum royalty still continuing at \$5,000 per year.

4. Plaintiff's property is in the development stage at the present time. The tonnage produced and sold in 1939 was in excess of 100,000 tons. The property of plaintiff is carried on its books at a figure in excess of \$500,000, but is heavily incumbered. In part because of the depressed condition of the bituminous coal industry, plaintiff is unable at present to find a purchaser for its property in a free and open market or to borrow money thereon from the banks.

4-A. Plaintiff's property has been operated at a loss for the past three years and the actual value of its properties is not to exceed \$30,000.00.

5. Practically the entire output of the coal produced by the plaintiff at its mine in Arkansas is sold to purchasers outside the State of Arkansas.

6. Plaintiff has not subscribed to or accepted the provisions of the Bituminous Coal Code provided for in Section 4 of the Bituminous Coal Act of (April 26) 1937, c. 127, 75th Cong., 1st Sess. 50 Stat. 72 et seq., 15 U. S. C., Sec. 828 et seq.

7. The defendant served notice and demand for taxes on the plaintiff on May 3, 1938, in the amount of \$14,031.37, \$532.14 penalty, and \$186.23 interest, totaling \$14,749.64. Defendant, on May 5, 1938, filed in the Office of the Circuit

Clerk and Recorder of Johnson County, Clarksville, Arkansas, Notice of Tax Lien under the Internal Revenue Laws, [fol. 63] in the total amount of \$15,488.62. As to the end of September, 1939, additional taxes in the amount of \$54,610.56 have been assessed against plaintiff. All of the taxes mentioned were levied and assessed under and by virtue of Section 3 (b) of the Bituminous Coal Act of 1937.

8. Since the date of passage of the Bituminous Coal Act of 1937, plaintiff has continuously produced coal and sold it in interstate commerce, without either joining the Code, or paying any tax under Section 3 (b); it has refused and continues to refuse to pay such taxes or any part thereof.

9. On August 31, 1937, Sunshine Anthracite Coal Company, plaintiff herein, and hereafter referred to as Sunshine, filed with the National Bituminous Coal Commission, established pursuant to Section 2 (a) of the Bituminous Coal Act of 1937, an application for exemption on the ground that its coal was not "bituminous coal" within the meaning of Section 17(b) of the Act. This was filed pursuant to the Commission's Order No. 28, dated July 27, 1937, providing a procedure whereby producers might secure a determination whether their coal is subject to the Act. In September 24, 1937, the Commission issued its Order No. 53, directing that a hearing be held before an examiner of the Commission in Fort Smith, Arkansas, on October 4, 1937, for the purpose of determining whether or not certain coals in the State of Arkansas are subject to the provisions of the Act, and for the further purpose of hearing applications for exemption, including that filed by Sunshine. Upon due notice, a hearing was held before the Examiner, and Sunshine introduced [fol. 64] evidence in support of its claim that its coal was not "bituminous coal," within the meaning of the Act. After hearing Sunshine's evidence, and evidence to the contrary, the Examiner filed a report recommending a disallowance of Sunshine's application. The Commission issued a proposed report to which Sunshine filed exceptions and the Commission heard oral argument thereon. On August 31, 1938, the Commission rendered an opinion, accompanied by its findings of fact and conclusions of law, and entered an order denying Sunshine's application for exemption.

10. On October 10, 1938, pursuant to Section 6(b) of the Act, Sunshine filed in the United States Circuit Court of

Appeals for the Eighth Circuit a petition for review of the Commission's order of August 31, 1938, mentioned above, praying that said order be set aside. On June 19, 1939, after argument, that court affirmed the order of the Commission. The Circuit Court of Appeals held that Sunshine had been accorded a full, fair and impartial hearing by the Commission, that the findings were based on substantial evidence, and that the order complained of was within the Commission's jurisdiction. Sunshine filed a petition for rehearing, which was denied July 8, 1939. On August 8, 1939, the court entered an order substituting Harold L. Ickes, Secretary of the Interior, and Howard A. Gray, Director of the Bituminous Coal Division of the Department of the Interior as parties respondent in place of the National Bituminous Coal Commission.

On September 23, 1939, Sunshine filed a petition for a writ of certiorari in the United States Supreme Court. On November 6, 1939, this petition was denied. A petition for rehearing was denied by the Supreme Court on December 4, 1939.

[fol. 65] 11. The question determined in the proceeding described in paragraph 10 is identical with the question presented in "paragraph one" of the complaint filed in this case, namely, whether the coal produced by Sunshine is "bituminous coal" as defined by the Bituminous Coal Act of 1937. Hence, the judgment in that case is conclusive of that issue here.

12. Bituminous coal is the nation's primary source of energy. Its use is vital to the public welfare. It supplies about 75 per cent of the energy used by public utilities and in manufacturing. It is essential to the industrial life of the nation and furnishes a great part of the fuel used for household heating. It is of great importance to transportation. It furnishes about 83 per cent of the fuel used by locomotives operating on the railways. Over a period of years the amount of coal transported by the railroads has ranged from 26 to 33 per cent of their total freight and has furnished from 16 to 19 per cent of the total revenues of the carriers.

13. In recent years, due largely to over-expansion of the industry during the World War, to competition from other fuels, and to increased efficiency in the use of fuel, the amount

of soft coal consumed has markedly declined. Even before the war, there had been an excess of capacity over demand, and the diminution accentuated the overcapacity.

14. Because of the high cost of temporarily shutting down a mine, due to the need for physical repairs, taxes and royalties, operators will continue to operate although the price of coal is below the cost of production. In view of the [fol. 66] relatively high overhead costs in the operation of a mine, each operator endeavors to increase his production so long as coal can be sold above actual out-of-pocket costs. There is thus a tendency to reduce prices in order to attain sufficient orders to keep the mine running at full capacity.

15. As a result of the facts stated in the preceding paragraph, capacity does not readily adjust itself to decreasing demand despite great reduction in price. As prices drop, each producer seeks only to increase his individual production so that he may survive. The overproduction has caused a bitter struggle for markets and merciless cut-throat price-cutting competition. Since 1924, the average price realized by producers of bituminous coal throughout the United States has generally been far less than the average of production. "Prices had been cut so low that profit had become impossible for all except the lucky handful."

16. These circumstances have been aggravated by factors peculiar to the coal industry. Consumers generally specify coal of particular sizes. The coal comes out of the mines in various sizes, and since it is uneconomical to store coal and mines generally do not have storage facilities, all of the coal, including unsold sizes, is immediately loaded into railroad cars at the mine. In order to avoid congestion at mine tracks, the unsold sizes are often consigned to some market, and then, to avoid mounting demurrage charges, producers are under pressure to slash prices.

17. The average price of coal dropped from \$2.68 per ton in 1923 to \$1.78 in 1929 (during which period prices were generally quite stable), and to \$1.31 in 1932. From 1923 to [fol. 67] 1929, the number of mines decreased about 3,300, a decrease of approximately 30 per cent. "Wages came down along with prices and with profits. There were strikes, at times nation-wide in extent, at other times spreading over broad areas and many mines, with the accompaniment of violence and bloodshed and misery and bitter feeling." Fi-

financial distress among operators, intense poverty among miners and the business and professional population dependent upon the mining industry, has pervaded even during periods of general prosperity.

CONCLUSIONS OF LAW

1. This case involves a controversy arising under the Constitution and laws of the United States. The amount in controversy exceeds the sum of \$3,000, exclusive of interest and costs:

2. This court has jurisdiction as a court of equity.

3. This court has no jurisdiction to determine whether plaintiff's coal is "bituminous coal" as defined by the Bituminous Coal Act of 1937. Under Section 4-A and Section 6 of the Act, the findings and order to be "bituminous coal" within the meaning of the Act was an order which the Commission had jurisdiction to make, and which can be reviewed only by a Circuit Court of Appeals.

4. In any event, the issue whether plaintiff's coal is "bituminous coal" as defined by the Act has already been conclusively determined against plaintiff by a former proceeding in which the National Bituminous Coal Commission [fol. 68] denied plaintiff's application for exemption from the Act. The Circuit Court of Appeals affirmed the Commission's order, and the Supreme Court denied a writ of certiorari.

5. Section 3(b) of the Act imposes a tax upon producers of bituminous coal in interstate commerce who do not subscribe to the Bituminous Coal Code.

6. The Bituminous Coal Act of 1937, C. 127, 75th Congress, 1st Session, 50 Stat. 72, is constitutional;

(a) The regulatory provisions in Section 4 are a valid exercise of the power of Congress to regulate interstate commerce and intrastate commerce directly affecting interstate commerce.

(b) The establishment of prices for bituminous coal sold in interstate commerce or intrastate commerce directly affecting interstate commerce is reasonable and is related

to a proper Congressional purpose and does not violate the Fifth Amendment.

(c) The standards of the Act are sufficiently definite and the Act contains no invalid delegation of legislative authority.

(d) Whether or not the taxing provisions of Section 3(b) could be otherwise sustained, since the regulatory provisions of the Act are valid, the taxing provisions of the Act are likewise valid as effecting the valid regulatory purpose of the Act.

(e) The exemption from the tax imposed by Section 3(b), of the producers who subscribe to the Bituminous Coal Code, and are subject to the regulatory provisions of Section 4, does not constitute an arbitrary classification contravening [fol. 69] the Fifth Amendment.

7. The bill of complaint should be dismissed.

(Signed) J. W. Woodrough, U. S. Circuit Judge.

(Signed) Thomas C. Trimble, Harry J. Lemley,
U. S. District Judges.

[File endorsement omitted.]

[fol. 70] IN UNITED STATES DISTRICT COURT

DECREE Filed February 16, 1940

This cause having been assigned for trial on February 15, 1940, trial was had, evidence heard and arguments of counsel presented, and the Court now files herein its findings of fact and conclusions of law thereon, and the Court now renders judgment as follows:

It is hereby ordered, adjudged and decreed that the defendant be and he is hereby permanently enjoined from collecting or attempting to collect taxes and penalties laid and accrued against plaintiff by defendant under Section 3(b) of the Bituminous Coal Act of 1937, same being the tax of 19½ per centum of the same price of plaintiff's coal, up to and including date of December 4, 1939.

It is further ordered, adjudged and decreed that as to taxes accrued or assessed against plaintiff under Section

3(b) of said Act from and after date of December 4, 1939, plaintiff's bill is without equity and the same is hereby dismissed.

It is further ordered, adjudged and decreed by the Court that notwithstanding the dismissal of said bill, the restraining order heretofore issued against defendant restraining him from collecting or attempting to collect taxes asserted against plaintiff under Section 3(b) of said Bituminous Coal Act of 1937, be and the same is hereby continued in full force and effect as to such taxes assessed and accruing from and after December 4, 1939, for the period of thirty (30) days from entry of this decree to enable plaintiff to appeal to the Supreme Court of the United States, and that if such appeal be perfected within said thirty (30) day period, said restraining order against the defendant shall [fols. 71-74] remain in full force and effect until final disposition of said appeal by said Supreme Court of the United States; otherwise, it shall cease to be operative and shall stand revoked at the end of said thirty (30) day period.

Signed and dated at Little Rock, Arkansas, this 16th day of February, 1940.

(Signed) J. W. Woodrough, U. S. Circuit Judge.

(Signed) Thomas C. Trimble, (Signed) Harry J. Lemley, U. S. District Judges.

[File endorsement omitted.]

[fol. 75] IN UNITED STATES DISTRICT COURT FOR THE WESTERN DIVISION OF THE EASTERN DISTRICT OF ARKANSAS

THE SUNSHINE ANTHRACITE COAL COMPANY, a Corporation,
Plaintiff,

vs.

HOMER M. ADKINS, as Collector of Internal Revenue for the
District of Arkansas, Defendant

Statement of Evidence

Be it Remembered, that on this, the 15th day of February, 1940, this cause coming on to be heard before the Honorable Joseph W. Woodrough, United States Circuit Judge, and the Honorable Thomas C. Trimble and the Honorable Harry

J. Lemley, United States District Judge, the plaintiff appearing and being represented by Messrs. Adamson, Blair and Adamson, of Terre Haute, Indiana, and Messrs. Patterson and Patterson, of Clarksville, Arkansas, and the defendant appearing and being present by Mr. Sam Rorex, United States Attorney, Mr. Leon B. Catlett, Assistant United States Attorney, Mr. Robert Sher, Assistant United States Attorney General, and Mr. Harold Leventhal, Assistant United States Attorney General appearing for the defendant and for the National Bituminous Coal Commission, and Messrs. Harper and Harper, of Fort Smith, Arkansas, [fol. 76] appearing for District #14 of the National Bituminous Coal Commission, when among other things, the following proceedings were had:

[fol. 77] GEORGE A. MERCHANT, was sworn as a witness on behalf of the plaintiff, and testified as follows on

Direct examination.

Questions by Mr. Henry Adamson:

Q. State your name and residence to the Court.

A. George A. Merchant, Chicago, Illinois.

Q. What official position, if any, do you occupy with the Sunshine Anthracite Coal Company?

A. Secretary and treasurer.

Q. Are the books of the Sunshine Anthracite Coal Company kept under your supervision and control?

A. They are.

Q. I will ask you if you have with you the balance sheets and operating statements of the Sunshine Anthracite Company?

A. I have.

Q. Let me have them, if you please. (Takes them.)

Mr. Adamson: We will ask the Reporter to make them plaintiff's exhibit number one.

The above documents marked for identification as exhibit number one (Plaintiff), and are in words and figures as follows:

PLAINTIFF'S EXHIBIT NUMBER ONE

Sunshine Anthracite Coal Company

Operating Statement

December 1939

Current Month

Jan. 1, 1939 to Dec. 31, 1939

	Tons	Amount	Per Ton	Tons	Amount	Per Ton
Coal Sales—Car Loads	10,710.60	27,074.17	2.5278	104,479.10	257,058.15	2.4604
Inventory—End of Period	838.00	2,907.75	3.4799	838.00	2,907.75	3.4799
Inventory—Beginning of Period	11,548.60	29,981.92	2.5962	105,317.10	259,965.90	2.4684
	1,260.00	3,280.00	2.6032	578.00	1,280.50	2.2153
Less: Commission on Coal Sales	10,288.60	26,701.92	2.5953	104,739.10	258,685.40	2.4698
		3,509.87	3.412		32,047.25	3060
Realization		23,192.95	2.2541		226,638.15	2.1638
Less: Operating, General & Administrative expense		27,147.74	2.6386		230,418.94	2.1999
Operating Profit or Loss		3,955.69	3845		3,780.79	0361
Plus: Other Income: Miscellaneous					241.40	0023
Net Profit or Loss	(in red)	3,955.69	3845	(In red)	3,539.39	0338

[fol. 78]

Plaintiff's Exhibit Number One—Continued

Sunshine Anthracite Coal Company

Cost Statement—Sunshine Mine

December—1939

Current Month—10,288.60

11,339 to 12,313.39
104,739 16 Tons

	Labor		Supplies		Labor & Supplies		Labor & Supplies	
	Amount	Per Ton	Amount	Per Ton	Amount	Per Ton	Amount	Per Ton
Bottom—Operating Labor & Supplies:								
Hand Loading	5,559.55	5404			5,559.55	5404	40,192.31	3837
Mining	765.40	0744	119.57	0116	884.97	0860	11,136.25	1063
Joy Loaders							4,401.83	0420
Conveying	508.92	0495	25.48	0025	534.40	0520	9,547.07	0912
Shooting and Drilling	629.51	0611	741.33	0721	1,370.84	1332	16,037.67	1531
Ventilation	257.87	0251	8.91	0008	266.78	0259	4,149.04	0396
Timbering			932.59	0906	932.59	0906	8,010.85	0765
Drainage	69.28	0067	9.39	0009	78.67	0076	1,063.97	0101
Power			693.91	0674	693.91	0674	7,769.39	0742
Supervision	1,254.83	1219	99.00	0097	1,353.83	1316	11,100.07	1069
Engineering							8.45	0001
Electrician and Helper	207.66	0202			207.66	0202	2,082.98	0199
Supplymen	524.33	0510	22.73	0022	547.06	0532	8,406.28	0803
Rock Loading	300.00	0292			300.00	0292	2,147.11	0205
Miscellaneous			4.28	0004	4.28	0004	1,607.63	0153
Bottom—Operating Labor & Supplies	10,077.35	9795	2,657.19	2582	12,734.54	1237	127,660.90	12188
Bottom—Maintenance:								
Mining Machines	244.40	0238	1,316.65	1279	1,561.05	1517	6,131.29	0585
Joy Loaders							3,772.99	0360
Conveying Equipment	108.35	0105	1,351.61	1314	1,459.96	1419	4,919.85	0470
Electrical Equipment			133.59	0130	133.59	0130	2,240.66	0214
Bottom—Maintenance	352.75	0343	2,801.85	2723	3,154.60	3066	17,064.79	1629
Top—Labor & Supplies:								
Tipple	339.94	0525	5.02	0005	344.96	0530	4,817.53	0460
Preparation	939.05	0913			939.05	0913	9,131.36	0872
Shop	192.66	0187	49.95	0049	242.61	0236	3,036.53	0290
Building Repairs							113.56	0011
Supervision	644.77	0627	72.20	0070	716.97	0697	9,377.09	0895
Mine Office	356.74	0347	84.91	0034	391.65	0381	3,312.02	0316
Watchman	103.81	0101			103.81	0101	935.36	0089
Wash House Attendant							37.65	0004
Miscellaneous	70.45	0068	8.56	0008	79.01	0076	548.39	0052
Company Car Expense			43.04	0042	43.04	0042	600.62	0057
Miscellaneous Petty Expense			151.36	0147	151.36	0147	729.52	0070
Supply Men	195.57	0190			195.57	0190	2,689.91	0257
Crib Handling	111.62	0108			111.62	0108	1,014.50	0097
Box Car Loader							406.02	0039
Reciprocating Feeder & Storage Bin	54.66	0053	10.78	0011	65.44	0064	2,459.63	0235
Top—Labor & Supplies	3,209.27	3119	375.82	0366	3,585.09	3485	39,209.69	3744
Total Labor & Supplies	13,639.37	13257	5,834.86	5671	19,474.23	18928	183,935.38	17561
General Expense:								
Insurance—General							1,771.67	0169
Insurance—Compensation							8,213.03	0784
Taxes—State							1,348.87	0129
Taxes—Social Security & Unemployment Insurance							5,067.97	0484
Royalties							15,710.89	1500
Total General Expense							32,112.43	3066
Administrative Expense:								
General Sales Expense							1,107.17	0106
Legal Expense							6,817.02	0651
Association Dues							740.34	0071
Chicago Office Expense							3,000.00	0286
Interest Expense							2,643.76	0252
Miscellaneous Expense							62.84	0006
Total Administrative Expense							14,371.13	1372
Total Operating, General & Administrative Expense							230,418.94	21999

Plaintiff's Exhibit Number One—Continued

Sunshine Anthracite Coal Company
Balance Sheet

	December 31, 1939	November 30, 1939	Increase-B Decrease-R
Assets:			
Fixed Assets:			
Plant and Equipment (Since 7/1/37)	175,133.46	175,133.46	
Development—New Slope Mine	41,308.00	41,308.00	
Machinery and Equipment	111,214.92	111,214.92	
Lease Hold	168,000.00	168,000.00	
Building	2,850.00	2,850.00	
Land	3,500.00	3,500.00	
Furniture & Fixtures	207.00	207.00	
Automobile	665.00	665.00	
	<u>502,878.38</u>	<u>502,878.38</u>	
Current Assets:			
Cash	451.22	573.98	122.76 (in red)
Accounts Receivable	178.57	78.57	100.00
Inventories	4,924.22	5,516.93	592.71 (in red)
	<u>5,554.01</u>	<u>6,169.48</u>	<u>615.47 (in red)</u>
Deferred Assets:			
Prepaid Insurance	1,365.23	1,551.58	186.35 (in red)
Advance Royalty	1,543.29 (in red)	1,951.91 (in red)	408.62
Miscellaneous	2,622.52	2,495.28	127.24
	<u>2,444.46</u>	<u>2,094.95</u>	<u>349.51</u>
Total Assets	<u>510,876.85</u>	<u>511,142.81</u>	<u>265.96 (in red)</u>

Sunshine Anthracite Coal Company
Balance Sheet

	December 31, 1939	November 30, 1939	Increase-B Decrease-R
Liabilities:			
Current Liabilities:			
Accounts Payable:			
Trade Creditors	20,867.11	22,052.32	1,185.21 (in red)
Binkley Coal Company	242,495.20	239,222.87	3,272.33
Notes Payable:			
Due 90 days	7,250.00	7,250.00	
Long Term	37,415.25	39,415.25	2,000.00 (in red)
Accrued Payroll	8,667.04	6,138.04	2,529.00
Accrued Interest Notes Payable	1,628.03	1,557.46	70.57
Accrued Taxes	2,801.41	2,106.39	695.02
	<u>321,124.04</u>	<u>317,742.33</u>	<u>3,381.71</u>
Reserves:			
For Compensation Insurance	3,985.05	3,677.03	308.02
Capital & Surplus:			
Capital Stock	10,000.00	10,000.00	
Surplus	71,686.00 (in red)	67,674.91 (in red)	3,955.69 (in red)
Paid in Surplus	247,398.36	247,398.36	
	<u>185,767.76</u>	<u>189,723.45</u>	<u>3,955.69 (in red)</u>
Total Liabilities	<u>510,876.85</u>	<u>511,142.81</u>	<u>265.96 (in red)</u>

[fol. 82] Mr. Adamson:

Q. Now, Mr. Merchant, where did you get the information that goes on the books of the Sunshine Anthracite Coal Company—First, where are the books kept that are in question?

A. Chicago, Illinois.

Q. That is the general books?

A. That is right.

Q. Where do you get the information that goes on the books of the Sunshine Anthracite Coal Company?

A. From the main office, which is located at Clarksville, Arkansas.

Q. You did not keep the set of books at Clarksville?

A. Not the general books.

Q. What do you keep at Clarksville?

A. Pay rolls, cost figures, and supply accounts.

Q. Now, how do those figures get on the general books of the corporation?

A. From the records transmitted from Clarksville.

Q. This is a balance sheet and operating statement for the calendar year of 1939, is it not?

A. That is right.

Mr. Adamson: We offer in evidence the balance sheet and operating statement of the Sunshine Anthracite Coal Company for the year 1939. The record will show admitted and read in evidence?

[fol. 83] The Court: Yes, the record will show admitted and read in evidence.

Exhibit Number One

The above documents admitted in evidence and read to the Court, and are in words and figures as heretofore shown herein.

Mr. Adamson:

Q. Mr. Merchant, how long have you been engaged in the coal mining business?

A. Since 1914.

Q. You are acquainted with the properties of the Sunshine Anthracite Coal Company?

A. Yes sir.

Q. All of the property and assets of the Sunshine Anthracite Coal Company are included in these balance sheets?

A. They are.

Q. I will ask you to state to the Court what in your opinion would be the amount that could be borrowed from a bank or lending agency on the security of the Sunshine Anthracite Coal Company property and assets.

The Court: You mean in that year or at the present time?
[fol. 84] Mr. Adamson: I mean at the present time.

The Court: At the present time?

Mr. Adamson: At the present time.

The Court: Just so I understood that.

Mr. Adamson: Yes sir.

A. Well, that would be a rather difficult question, but I do not think that any bank would lend anything, coal properties are not very highly regarded from a banking standpoint and the lending of money.

Q. What, if any, value would it have for sales purposes on the present market?

Mr. Sher (Interrupting): Just a minute, Mr. Merchant, are you familiar with the general market value of coal properties throughout the United States?

A. Well, I think I am.

Q. Have you been devoting your activities solely to acting as bookkeeper or auditor of the coal company, or have you been actively engaged in the appraising of properties for sale?

[fol. 85] A. I have not been engaged in the appraising of properties; I have looked over various properties from the viewpoint of purchasing them, and I have spent about eight years in operations.

Q. How long ago was that?

A. That was started in 1924 and until 1932.

Q. How long is it since you have been looking at properties from the standpoint of purchasing?

A. Well, I looked over property in Indiana about five years ago.

Q. You have not done any of that since?

A. I don't recall having looked over one since.

Mr. Sher: I think I will have to object to any testimony by this witness. He has not appraised any properties for the purpose of sale or looked at any properties, I don't think he is a competent witness on that point.

Mr. Adamson: That simply goes to the weight to be given to his testimony.

The Court: Do you think the owner of the property is not able to give the value or does it come within that—
[fol. 86] Mr. Adamson: I think on matters of general knowledge of that kind, anybody can give an opinion. There may be some question as to the weight.

The Court: Is it expected to show it has great value?

Mr. Adamson: No, they—They seem to have the theory that we could pay all these taxes and still continue to operate, and we alleged in the complaint that we couldn't do that; and we want to follow the formal allegations of the complaint.

The Court: The purpose is to show it has a small value?

Mr. Adamson: The purpose is to show that we could not beg, borrow or steal money enough to pay the nineteen and one half percentum.

The Court: Is it not, generally speaking, it is within the issues affected by your pleadings?

Mr. Sher: Oh yes, it is in the issue, but the only question I raised is whether this witness himself has the knowledge to testify to coal values.

[fol. 87] The Court: That goes to the value?

Mr. Adamson: That is correct, for the purpose of informing the Court as to the whole situation, in an equity suit. (Here the Court confers among themselves.)

The Court: The objection will be overruled, and the testimony will be received for what it may be worth.

A. Well, it is my opinion that that property, from a sale value—

Mr. Sher: What was the answer?

The Reporter: (Reads.)

A. Would be only worth what might be received from the sale of the equipment which is on the property.

Q. Now, can you give us an approximation on that, Mr. Merchant?

A. Well, that equipment should bring twenty five to thirty thousand dollars at re-sale.

Q. Now, Mr. Merchant, I will hand you plaintiff's exhibit number one. During the year 1939, what were the results of the operation of the mine of the Sunshine Anthracite Coal Company?

A. There was a net operating loss of \$3,539.39.

[fol. 88] Q. Will you explain more fully what you mean by "net operating loss"?

A. Yes sir.

Q. A little louder, please.

A. That is a loss which represents the difference between the amount received for all coal sold and the amount of actual labor, supplies, insurance, taxes, and general expense. It has not included in there any charge whatsoever for officers' salaries, depreciation, depletion, or any over-head charges.

Q. Do you know what the operating loss or profit was for the year 1938?

A. It was a loss, but I could not say exactly what—
(stops)——

Q. Mr. Merchant, I will ask you to tell the Court, is this property fully developed yet?

A. No sir, it is not.

Q. When developed, what will be the potential capacity of production at this mine?

A. Well, the equipment, conveyors, tipples and so forth, are sufficient to handle approximately two thousand tons in eight hours.

Q. 2,000 tons in what?

A. Eight hours.

Mr. Adamson: That is all.

[fol. 89] Cross-examination.

Questions by Mr. Sher:

Q. Do you have this exhibit, may I have it? (Takes it.) This operating statement shows a commission on sales for the year 1939 of \$32,047.25. To whom was that commission paid?

A. To the Binkley Coal Company.

Q. Has the Binkley Coal Company the exclusive sales agency for all Sunshine Coal?

A. Yes sir.

Q. And the Binkley Coal Company is located in Chicago, Illinois?

A. Yes sir.

Q. Are you an officer of the Binkley Coal Company?

A. I am.

Q. What office do you hold?

A. Secretary and treasurer.

Q. The Sunshine Anthracite Coal Company has no office in Chicago; has it?

A. Yes, I would say they have, it is in, it's in the same office it is in—it's in the same office, room, that the Binkley Coal Company, but it is considered the office of the Sunshine Anthracite Coal Company; they receive mail there.

[fol. 90] Q. The Sunshine Anthracite Coal Company is an Arkansas corporation, and its sole business is operating the coal mine in Arkansas?

A. That is right.

Q. And the only office it has in Chicago is the office it has in conjunction with the Binkley Coal Company?

A. That is right.

Q. By reason of the fact you are an officer of both companies?

A. That is right.

Mr. Adamson: Now we object to what the reason is, that is just a state of mind.

The Court: That is rather a formal question and he has answered it.

Mr. Sher: (Resuming cross-examination.)

Q. I notice that you have legal expense of \$6,817.02, is that for defending, for prosecuting this lawsuit, Mr. Merchant?

A. For part of it.

Q. Now your balance sheet shows fixed assets as of December, 1939, total \$502,878.38, which includes plant and equipment, development, and machinery and equipment, lease hold, building, land, furniture and fixtures, and an automobile. I understand you to say that you think all [fol. 91] of these assets, fixed assets, would bring no more than twenty five or thirty thousand dollars on the market today.

A. I do not think it would bring more than that.

Q. For all that machinery and equipment, which is carried on your books at \$111,214.92?

A. That is right.

Q. Well, is that because of the general depressed condition of the coal industry, or is it because of some peculiarity of this particular machinery?

A. Well, I would say both items enter into it.

Q. Is this mine in good condition mechanically or in bad shape?

A. No, I don't say it is in, I would say it is in fairly good condition, but the equipment is equipment that is built and

put into this mine for this mine alone. That equipment would be—No one would want the equipment in the mine where you had a six or seven foot thickness of coal, or other conditions. In order to place the equipment in any other mine, it would have to be a mine of similar conditions.

Q. Is it your idea that you test the value of mining property by what it would be worth to tear down and move or [fol. 92] don't you test it by what it would be worth to somebody who would want to operate the machinery?

A. Well, from that standpoint, the record shows, the mine has lost money so it would not have much value from an earnings standpoint.

Q. Would your company be willing to sell the mine to me today for twenty five or thirty thousand dollars?

A. That might be a good policy.

Q. So that estimate of the value of this particular mine is based largely on the fact the mine has not been making money?

A. That is right.

Q. Would you ~~say~~ generally throughout the country that mining property that is listed at five hundred and twenty thousand dollars would not bring more than twenty-five or thirty thousand dollars?

A. Lots of them have not.

Q. Are you talking about a forced sale or sale where you have a buyer who is willing to buy and a seller willing to sell?

A. Well, if you have a buyer willing to buy and a seller willing to sell, you can always arrive at a price.

Q. And that price would be considerably higher than twenty five or thirty thousand dollars?

A. Yes, and there has to be some reason for a man being [fol. 93] willing to buy.

Q. That is true of all sales?

A. Yes.

Q. Suppose you had a buyer willing to buy that was interested in coal properties, let's forget about forced sales, what would you estimate the sale value of this property today?

A. It would be pretty hard to estimate, because any estimate that I have ever made on a coal property was based on earning value, I think that that is the only, only fair point at which you can purchase any coal property, it may have ten million dollars of investment, but if it has lost money,

it is not worth anything to you unless there is some possibility of changing it and making it earn money.

Q. And you would not consider the equipment as assets of any value at all, you only consider its earnings?

A. That has always been my theory on the value of a coal property.

Q. Is it not possible for a good coal operator to take property that has been losing money and turn it into a good, going concern?

A. That has been done, yes.

Q. How would you value this property if you were interested in buying it?

A. I would value it more from a survey of its potential [fol. 94] earnings than any other one point.

Q. But you have not any opinion as to what it is worth in the free and open market?

A. No, I have not.

Q. Now, turning for a moment to this matter of not being able to borrow money on the mine, that is tied into this same question of sale, you can't borrow money on it because it has not been making money?

A. That is right.

Q. If a mine were making money, was profitable, then it would be possible to borrow money on it?

A. Be much more probable, however, the banks do not like coal properties.

Q. And is that because the coal industry generally has been in a depressed condition for a number of years?

A. I think so.

Q. I notice that in the balance sheet of current liabilities there is an item as of December 31, 1939, of \$242,495.20, owed to the Binkley Coal Company. Can you tell us what that is for?

A. Money advanced.

Q. Does the Sunshine Anthracite Coal Company buy coal from Binkley or sell coal through Binkley?

A. Sells coal through Binkley.

[fol. 95] Q. How did Binkley happen to advance that much money?

A. Well, the Sunshine has—(stops)—spent over \$100,000.00 in equipment.

Q. And got it all through Binkley?

A. And they lost money for two or three years, and it had

to come from some place, and the Binkley Coal Company has advanced it.

Q. The Binkley will take a chance where a banker wouldn't be willing to?

A. Always has.

Q. What is the Binkley Coal Company? Is that a selling agency, or does it also operate mines throughout the country?

A. It is a selling agency.

Mr. Adamson: Now, we wanted to let it come in to bring out the situation, the Binkley Coal Company is not a party to this suit, and anything with reference to the Binkley Coal Company is immaterial and irrelevant, and could not throw any light upon the issues involved in this case.

Mr. Sher: You say they owe Binkley \$242,000, and I thought I ought to be allowed to inquire how it come about and what for.

[fol. 96] Mr. Adamson: He has given you that, and now he is asking something about what the Binkley Coal Company is.

Mr. Sher: I am trying to find out how they come to owe that much money on a mine which is worth twenty-five or thirty thousand dollars.

The Court: It would seem the whole statement is before us, and it would seem that cross examination on the items in the statement is admissible—The objection at this time is overruled.

Mr. Sher: Will you read the question please, Mr. Reporter?

The Reporter (Reading): "What is the Binkley Coal Company? Is that a selling agency or does it also operate mines throughout the country?"

A. A selling agency.

Q. Exclusively?

A. That is right.

Q. And generally, as part of its activity as selling agent, it advances money to various mining companies to tide them [fol. 97] over periods of stress?

A. Often, quite often.

Q. Now, this \$242,000 was advanced in that manner?

A. That is right.

Q. For development purposes and for needed capital and so on?

A. That is right.

Q. Now what commission does the Binkley get on its sales of Sunshine Coal?

A. Fifty cents a ton on prepared sizes, domestic sizes, and twenty five cents on commercial sizes.

Q. Is that generally the commission scale that holds throughout the coal industry, if you know?

A. In this territory, it is.

Q. Now these other items of liability, \$20,867.11 to "Trade Creditors"; does that mean—current supply bills?

A. Yes sir.

Q. Notes payable due in ninety days, \$7,250.00; to whom is that due and payable?

A. Well, there is, at that time there was about \$1600.00 due the Reconstruction Finance Corporation.

Q. And has that been cut down since?

A. Yes sir, there was a payment around the first of February, \$1250.00, for that period, and the other, I can't give the total on it, but it is for various creditors. We had given [fol. 98] notes rather than—(stops)—

Q. Is any of that due to the Binkley Coal Company?

A. I think not.

Q. Long term notes \$37,415.25; to whom is that payable?

A. That is payable to the Binkley Coal Company.

Q. Was that a part of the \$242,000 owed—

A. Correction there on that, that is, that is notes, that is still due to the Dow Manufacturing Company on this equipment, which is payable \$2,000.00 a month.

Q. And are these notes guaranteed by the Binkley Coal Company?

A. No, they are not.

Q. Not guaranteed at all?

A. No.

Q. Is there a lien on the equipment for security?

A. Yes sir, their equipment is sold in that way.

Q. Now, are there any mortgages or liens or any other kind on this property?

A. The Reconstruction Finance Corporation has some mortgages on this property.

Q. But that balance is just a little over \$400.00?

A. Yes, I think the final note on that is due in April.

Q. Are there any other liens or mortgages on the property?

A. I think, I think the Binkley Coal Company has a second [fol. 99] mortgage to secure—(stops)—

Q. Now, the Binkley Coal Company owns the controlling stock interest in the Sunshine Anthracite Coal Company?

Mr. Adamson: We object to that, if the Court please.

The Court: That seems to be a serious objection; what do you say as to that?

Mr. Sher: Here is \$321,000 of liabilities, \$242,000 is owed to the Binkley Coal Company, I think the situation, the financial condition of the company is different if that money is owing to a controlling stockholder than if it is owing generally. Now, I do not propose to pursue this to any great extent, but I think it is appropriate to bring out the relationship as between these two companies.

The Court (after conferring among themselves): Well, the objection is sustained to that question.

Mr. Sher: We take exception to the ruling of the Court and offer to prove through the witness Merchant that the Binkley Coal Company owns the controlling interest in the Sunshine Anthracite Coal Company through stock owner- [fol. 100] ship. I am sorry I am unable to do any better than that on the offer, your Honors, because the information is peculiarly within the knowledge of this witness and the plaintiff.

The Court: The ruling stands—You did object to the offer?

Mr. Adamson: We object of course, if the Court please.

The Court: The same ruling.

Q. Do you have with you, Mr. Merchant, any figures as to the tonnage of coal sold by the Sunshine Anthracite Coal Company during the last two or three years?

A. It shows the tonnage there.

Q. By reference to this, can you tell us what the tonnage was in 1939?

A. Why, yes, 104,739.10, tons.

Mr. Adamson: Say it loud enough for the Court to hear.

A. 104,739.10 tons.

[fol. 101] The Court:

Q. Produced and sold?

A. That is right.

Mr. Sher:

Q. Do you have any figures for 1938?

A. No, I have not.

Q. Can you tell us roughly about how these figures would compare with the figures for 1939?

A. Smaller.

Q. Would you say the 1939 sales were twice the 1938 sales?

A. Well, I wouldn't want to say positively that they were; I will say that the 1939 sales were substantially larger than the 1938.

Q. Now how did 1938 compare with 1937?

A. Well, I would say approximately the same, the tonnage was light in both years.

Q. And was 1937 the first year that the Sunshine was operated by new machinery and equipment?

A. It was.

Q. Was the Binkley Coal Company the sales agent prior to 1937?

A. It was.

Q. Do you know what the tonnage of the other operators [fol. 102] in the Spadra field was in 1939?

A. No, I do not.

Q. Do you have anything to do with the advertisements that are put out by either the Sunshine Anthracite Coal Company or the Binkley Coal Company with respect to this Sunshine coal?

A. Do you mean do I have personal charge of it?

Q. Do you have anything to do with it?

A. No—I know that it is advertised.

Q. Are the advertisements submitted to you before they are put out?

A. No.

Q. Do you see them?

A. I see them, yes.

Defendant's Exhibit Number One marked for identification.

Mr. Sher: Now I shall show you the defendant's exhibit number one which on its face appears to be an advertisement put out by the Binkley Coal Company at its Minneapolis office. This contains the statement—

Mr. Adamson: Now if your Honors please—

[fol. 103] Mr. Sher: This is an equity case, please, if you will permit me to ask the question, I do not think the jury here will be seriously misled. It contains the statement

"Ruby-Glow Arkansas Anthracite, formerly sold as Sunshine" and that is a list of the prices. At the bottom it states "This mine produced more coal than the rest of the combined field last season." I will ask you if you are familiar with that advertisement?

(Hands exhibit one to the plaintiff.)

Mr. Adamson: Now, if your Honors please, we would kind of like to let that go in as a little "puffing" but we do not think it has anything to do with this record.

The Court: I cannot see where it has. Wherein do you think it is relevant?

Mr. Sher: The comparison of this company with its competitors, it is a factor to be considered in connection with whether equitable relief should be granted.

Mr. Adamson: The only question is the ability to pay on its part, whether they produced more or less coal is immaterial.

[fols. 104-117] Defendant's Exhibit Number One

Defendant's exhibit number one, being "June, 1939 Price List of Binkley Coal Company" offered in evidence by defendant, as defendant's exhibit number one, same was objected to by counsel for plaintiff, the objection was sustained by the Court, and said exhibit is in words and figures as follows:

[fol. 118] The Court: We think the objection will be sustained.

Mr. Sher: We take an exception and offer to prove from the witness Merchant that the Sunshine Anthracite Coal Company produced more coal than the rest of the combined field in the season prior to June, 1939.

Mr. Adamson: The same objection.

The Court: The same ruling.

Mr. Sher:

Q. Can you tell us, Mr. Merchant, what commissions the Binkley Coal Company received in the year 1937-38 on this coal?

Mr. Adamson: We object; wait a minute.

Mr. Sher: Yes, sir.

A. No, I can't.

Mr. Adamson:

Q. You mean from the Sunshine Anthracite Coal Company?

The Court: He says he can't tell.

[fol. 119] A. You mean in dollars and cents; I haven't that with me and I would not know.

Mr. Sher:

Q. The rate paid for commissions in 1937-38 was the same as that paid in 1939?

A. That is right.

Q. Can you tell us how the amount of production of Sunshine in each year is determined?

A. By railroad weight.

Q. Who decides whether Sunshine should produce 50,000 tons or 100,000 tons?

A. That is a matter of moving the product.

Q. If the Binkley Coal Company is able to sell the coal, the Sunshine Anthracite Coal Company produces it?

A. That is right.

Q. And that is the sole basis?

A. That is right, up of course to the limit of production.

Mr. Sher: I think that is all.

Redirect examination.

Questions by Mr. Adamson:

Q. In 1937-38, Mr. Merchant, was the Sunshine mine fully developed?

A. No, sir.

[fol. 120] Q. What was its capacity of production, if you know, during the first year of the development of the mine?

A. Well, not to exceed \$500.00 per day.

The Court: You mean five hundred tons in an eight hour shift.

A. Five hundred tons in an eight hour shift.

Recross-examination.

Mr. Sher:

Q. That is the first year?

A. That is right.

Q. Now in the second year what would be its capacity?

A: Well, it was not much above that.

Q: And the mine is not yet fully developed?

A: Not yet fully developed.

Mr. Sher: That is all.

Mr. Adamson: That is all.

The Court: The witness may be excused.

OFFERS IN EVIDENCE

Mr. Adamson: We offer in evidence, if your Honors [fol. 121] please, the deposition of Dr. Arno C. Fieldner, chief of the Technological Branch, and chief engineer of the Coal Division, Bureau of Mines, Washington, D. C.

Mr. Sher: We object to the introduction of this evidence on the ground that all of it goes to the question of the character of the plaintiff's coal and that question has been conclusively determined by the Bituminous Coal Commission in the Circuit Court of Appeals for the Eighth Circuit in the case of Sunshine Anthracite Coal Company against the National Bituminous Coal Commission, 105 Federal Second, 599, and it is outside of the scope of the issues before this Court, as determined in its decision on January 8th, 1940.

The Court: Is that the matter the deposition is directed to?

Mr. Adamson: Well, that would be rather difficult to answer, yes or no, if your Honors please. Certainly the deposition as to his qualifications is admissible. Then he testifies as an expert upon the question of the classification of coal, if your Honors please. Now, we offer this upon this theory: Ultimately we intend to take the position which we think is sound, that the construction of the terms of this Act is purely a judicial function and cannot be dele- [fol. 122] gated to any administrative board. In arriving at the correct construction of the language used in the Statute, this Court can take into consideration the facts which existed at the time, the conditions which existed at the time, the history of the legislation, and of the object that is being legislated with reference to the rules of construction laid down by the Courts. It is our contention that the ultimate construction, when you take out the object to which this Act is to be applied, is a judicial function, and that is if it is construed any other way, it raises a serious legal question as to its validity, both on the ground

of the delegation of judicial power and the ground of the delegation of legislative power.

The Court: These are matters of argument, and you have the deposition and it is directed toward the general inquiry?

Mr. Adamson: It is directed toward—

The Court: It can be used in argument and the deposition [fol. 123] will be excluded and the objection sustained and exceptions allowed.

Mr. Adamson: We offer to prove by the deposition of the witness, in the deposition, and the deposition will so testify, if permitted to answer—

The Court: You may offer to prove what is shown in the deposition.

Mr. Adamson: Let the record show we offered it, offered to prove it.

The Court: Let the record show you offer to prove what is in the deposition and that you except.

Mr. Adamson: Yes sir, and we are saving exceptions without—I do not believe it is necessary to save exceptions.

The Court: That is so; the rules provide it, and I take it the statement in that deposition is to the same point and the same ruling as to the offer.

Mr. Adamson: Alright, we will make the same offer of Thomas A. Hendricks. We offer in evidence the deposition of Thomas A. Hendricks, geologist with the Geological [fols. 124-125] Survey, United States Department of the Interior, Washington, D. C. Now, this is the same thing.

Mr. Sher: And we make the same objection to the receipt of this testimony.

Mr. Adamson: And we make the same record.

The Court: And the ruling is the same and you offer to prove what is in it and you make the same objection and the record will be repeated.

Depositions

The above depositions offered in evidence by the plaintiff, excepted to by defendant, and exceptions sustained by the Court, and the same are in words and figures as follows:

[fol. 126] IN UNITED STATES DISTRICT COURT

[Title omitted]

Washington, D. C.,
Saturday, December 16, 1939.

[fol. 127] Depositions of Dr. Arno C. Fieldner and Thomas A. Hendricks, witnesses of lawful age, taken on behalf of the defendant in the above-entitled cause, wherein The Sunshine Anthracite Coal Company is the plaintiff and Homer M. Adkins, as Collector of Internal Revenue for the District of Arkansas, is the defendant, pending in the District Court of the United States for the Eastern District of Arkansas, Western Division, pursuant to agreement, before Lloyd L. Harkins, a notary public in and for the District of Columbia, at room 4415 New Department of the Interior Building, Washington, D. C., at 10:10 o'clock a. m., on Saturday, December 16, 1939.

Appearances:

On behalf of the plaintiff: Henry Adamson.

On behalf of the defendant: Robert E. Shery, Special Assistant to the Attorney General. Harold Levinthal, Attorney, Bituminous Coal Division, Department of the Interior. Robert L. Stern, Special Assistant to the Attorney General.

Mr. Adamson: These depositions are taken by agreement.

[fol. 128] Mr. Shery: It is understood by agreeing to the taking of these depositions without the notice required by the rules, that the defendant does not waive the objection to the admissibility of the evidence.

DR. ARNO C. FIELDNER, a witness of lawful age, was thereupon duly sworn and, being examined by counsel, testified as follows:

Direct examination.

By Mr. Adamson:

Q. State your name and address, Doctor.

A. Arno C. Fieldner, Cosmos Club, Washington, D. C.

Q. What is your official position?

A. Chief, Technological Branch, and chief engineer of the Coal Division, Bureau of Mines.

Q. How long have you been connected with the Bureau of Mines, Doctor?

A. Since it was organized and established in 1910.

Q. What was your preliminary education?

A. I graduated in 1906 in chemical engineering from the Ohio State University.

Q. What profession or business did you engage in immediately after your graduation?

A. I worked for the Denver Gas & Electric Company immediately after graduation for somewhat less than a year.

[fol. 122] Q. What was the nature of your employment with them?

A. I was an apprentice gas engineer.

Q. Did you at that time deal in and study coal?

A. No, sir.

Q. When did you first start dealing with coal?

A. In 1907, when I entered the service of the Technological Branch of the United States Geological Survey. I began work on coal analysis at that time.

I continued on coal analysis work up to the period that this Technological Branch was transferred to the newly created Bureau of Mines in 1910. Some time, a year or two later, I was in charge of the coal analysis laboratory at the Pittsburgh Experiment Station of the Bureau of Mines.

Q. Since that time have you been engaged in the technological study of coal?

A. Yes, I have been engaged in the technological studies relating to coal, its composition and its utilization from time to time ever since that period.

Q. In the discharge of your official duties, Doctor, just what particular field of coal did you deal with?

A. As chief engineer of the Coal Division I have administrative and technical charge of the investigative technical studies of the Bureau of Mines, all relating to the composition, analysis and testing of coal, to research on its utilization as a fuel, utilization as a raw material for the manufacture of coke and gas, and to its utilization for the production of liquid fuels.

Q. In other words, in your official capacity, you made a study of all production and use of coal?

A. Personally I didn't give much attention to the mining of the coal, the methods of mining or the methods of pre-

paration or washing; my personal interests are in the composition of coals and their utilization and testing.

Q. But you deal with the coal industry of the entire United States?

A. Well, yes, any of us in the Bureau of Mines deal with those subjects from a national point of view and take in the entire coal industry.

Q. Now, Doctor, I will ask you to state what you mean by classification?

A. Well, in my work on the classification of coal, naturally my definitions of coal classification are closely allied to its classification on the basis of its properties, its chemical and physical properties as worked out by the Coal Classification Committee, sponsored by the American Society for Testing Materials, operated under the rules of the American Standard Association.

[fol. 131] There are other points of view of coal classification. There are many ways in which coal might be classified, depending on the point of view.

Q. Is there at this time any classification which is generally approved and in general use in the coal mining industry?

Mr. Sher: We object to this evidence on the ground that it is incompetent, irrelevant, and immaterial; and on the further ground that this Court is without jurisdiction to hear any questions relating to the character of the plaintiff's coal; and on the further ground that all questions relating to the character of the plaintiff's coal have been conclusively determined in the case of *The Sunshine Anthracite Coal Company vs. National Bituminous Coal Commission* which was tried before the National Bituminous Coal Commission, and on appeal before the Circuit Court of Appeals for the Eighth Circuit and affirmed by the United States Supreme Court.

Mr. Adamson: No, it was not affirmed by the United States Supreme Court.

[fol. 132] Mr. Sher: Certiorari was denied by the United States Supreme Court.

Let the record show that this objection will stand to all evidence relating to the character of plaintiff's coal without the need of making separate objections to each question.

Mr. Adamson: That is satisfactory.

Now, will you read the question?

(The pending question, as above recorded, was read by the reporter.)

The Witness: That is the question I have to answer?

Mr. Sher: Yes.

Mr. Adamson: He just notes an objection; that is all.

The Witness: There is a classification of coals according to rank that has been adopted by the American Society for Testing Materials and by the American Standards Association which is available for the general use of the coal industry.

By Mr. Adamson:

Q. Is that the end of your answer, doctor?

[fol. 133] A. Yes.

Q. Is that a standard in general use in the coal industry at this time?

A. I can't say from personal knowledge as to whether or not this standard is in general use throughout the entire coal industry. I think it is gaining ground. It is quite new and it has only been adopted for a few years. Parts of it, I know, are in pretty general use because they are not much different from the older customary classifications.

Q. Doctor, do you use this standard in your work and in your official capacity with the United States Bureau of Mines?

A. Yes, sir.

Q. Now, Doctor, prior to 1926, did the words "bituminous", "semibituminous", or "subbituminous" have any well defined meaning in the coal industry?

A. Semibituminous?

Q. Bituminous, semibituminous, and subbituminous, in that order?

A. Bituminous and semibituminous were pretty generally used in the coal industry prior to this classification; subbituminous was perhaps not so generally used.

Q. I will ask you to state what the term "bituminous" as generally used in the coal mining industry prior to 1926 meant.

[fol. 134] A. It is rather difficult for me to say just what "bituminous" did mean to the members of the coal industry. I would have to guess at that.

My guess is that probably any coal except anthracite or lignite would be bituminous coal; that is, outside of anthra-

cite or lignite. In general, coals which give off smoke and gas, on distillation. That is what "bituminous" means.

Q. What basis did you use for classifying coal prior to 1926?

A. We used the U. S. Geological Survey classification of Mr. R. Campbell.

Q. Doctor, could you tell us what the method of classifying bituminous coal in the Campbell formula prior to 1926 was?

A. It was based largely on what they call fuel ratio; that is the ratio of the fixed carbon to the volatile matter in the coal.

Q. Are you acquainted with the Spadra Field in Arkansas and the coal production there?

A. In a general way, yes, although I have never been there.

Q. Did your department have occasion to classify that coal prior to 1926?

[fol. 135] A. No, we accepted the Geological Survey classification.

Q. Do you know what the classification was of the Geological Survey?

A. I don't know from personal knowledge for the individual coals. I know there was some anthracite and low volatile bituminous in Arkansas, but I cannot say and I do not remember what the classification was for this particular mine by the Geological Survey at that time.

Q. Do you remember what the classification of the Spadra Field was at that time?

A. I could not tell you.

Q. Doctor, after 1926 was there any standard generally used in the coal industry for the classification of coals?

A. Well, my opinion is that no particular change took place in the coal industry immediately after 1926.

Q. Was there a committee appointed to standardize classification?

A. There was, yes.

Q. I will ask you to state briefly the history of that committee.

A. The Committee known as the Sectional Committee on the Classification of Coal was organized under the sponsorship of the American Society for Testing Materials under the rules of the American Standards Association.

This committee actually was organized at a meeting on

[fol. 136] June 10, 1927, but there was a preliminary meeting in 1926, which was called by the American Standard-Association, at which there were present the representatives of the various engineering, scientific and trade associations interested in the production or the consumption of coal.

This meeting was held in Pittsburgh, and they passed a resolution that there was need for the development of a standard system for classifying coals that would be generally acceptable in this country.

Q. Now, Doctor, you were chairman of that committee, were you not?

A. At this organization meeting in 1927 I was elected chairman of that committee.

Q. Was this Dr. Campbell, who was with the Geological Department, on that committee.

A. Yes, he was a member of that committee.

Q. Now, you may state briefly what the results of that committee's work were.

A. The committee first adopted a statement of the scope of this work. This is given in the following words: the classification of all coals from anthracite to lignite to be [fol. 137] based upon such chemical and physical characteristics as will make the plan most readily adaptable to industry and commercial use on a national scale.

Now, this committee had the cooperation of another committee, representing the Canadian group. This other committee was called the Associate Committee on Coal Analysis, which operated under the auspices of the National Research Council of Canada.

Through this cooperation the classification was planned for both Canada and the United States Coals.

The committee carried on extensive studies of the coals of the country and examined various previously proposed systems of classifications. They also carried on a great deal of research work on the properties of coal, and in the course of several years they drew up and submitted tentative specifications for the classification of coals by rank and by grade. These tentative specifications were adopted as tentative by the American Society for Testing Materials in 1934.

These tentative specifications cover the classification of coals in different classes and groups ranging from the lignitic class on the one hand to the anthracite class on the other.

In this scale of classification, the lowest rank was lignite, [fol. 138] and then subbituminous next, and then bituminous, and then the anthracitic class.

These classes again were subdivided into groups, as for example, the anthracitic class comprising three groups: metaanthracite, anthracite, and semianthracite.

Likewise, the bituminous class was divided into five groups: Low volatile bituminous coal, medium volatile bituminous coal, high volatile A bituminous coal, high volatile B bituminous coal, and high volatile C bituminous coal.

These tentative specifications were revised somewhat in the following year, 1935.

Q. Now, were there any material changes made at that time?

A. Well, there was one rather material change made in 1935.

Q. What change was that, Doctor?

A. In the low volatile bituminous coal group, the boundary line was changed one per cent in the fixed carbon. In the 1934 specification giving 77 per cent dry fixed carbon, that was changed to 78 per cent dry fixed carbon, and the dry volatile matter was changed from 23 to 22 per cent. That was between the boundary line between the low volatile bituminous coal and the medium volatile bituminous coal where this change was made.

[fol. 139] Q. At the time of that change was this method of classification in general use both by the consumers and the producers in the coal industry?

A. I doubt whether it was in general use, at that time.

Q. When, in your opinion, did it become of general use in the industry?

A. I really haven't any opinion on that; I don't know how generally it is used in the industry, per se as of this time. I know we used it in the Government in the Bureau of Mines for the classification of coals in our technological work and in our statistical work and in our buying of coals for the Government, but it is rather difficult for me to answer that.

I may say this, in addition, that the National Association of Purchasing Agents has been quite active in introducing this new system of classification into the industry. They have gotten out some publications on it.

Q. What territory do they cover?

A. They are a national agency.

Q. The National Association of Purchasing Agents?

A. Yes, of purchasing agents.

Q. Now, in your contract, with the producers, have you gathered any information as to whether or not it is in use with the producers?

[fol. 140] A. I really haven't enough information to say.

Q. Do you know some producers who are using it?

A. I cannot point out a specific instance because that sort of material, that is concrete evidence, does not come to me.

Q. It comes to other members of the department, however?

A. Well, I don't know as it would, although it would if we still had the Statistical Division on Bituminous Coal, but that is now in the Coal Division, or was transferred to the Coal Division. They would know as to how the industry uses it because they deal with the statistics that are sent in.

My general reaction is that the more progressive of our coal companies do use this classification, but I really cannot point out any documentary evidence of it. I do know that there is a great lag in the use of any new scheme of nomenclature among laymen.

Q. Does the term "bituminous coal" have any well defined meaning in the coal industry at the present time?

A. I think it does.

Q. Will you state what that meaning is?

A. I think that in the coal industry "bituminous coal" means coal which burns with a luminous flame, which gives off smoke, and which gives off a considerable percentage [fol. 141] of gas when it is heated in a closed retort. It may or may not form a coke in the residue left behind. It may be coke or it may be a char.

I think those are the principal characteristics used ordinarily outside of the coal classification scheme. I am speaking now outside of the coal classification scheme.

Q. Can you express what you have said in the chemical formula?

A. I can express the definition of bituminous coal in terms of the coal classification system that was agreed upon by this committee, the American Society for Testing Materials, and the American Standards Association.

Q. In your opinion, Doctor, is that a correct method of classification?

A. Yes, that is in my opinion. That is a correct method of classification.

Q. Doctor, what is semibituminous coal?

A. Semibituminous is a name that was applied to a rank of coal under the older Geological Survey system of classification. This name was not used in the new A. S. T. M. [fol. 142] classification; its place was taken subsequently by the two groups, the low volatile bituminous coal and the medium volatile bituminous coal.

Q. Would you say then that the term "semibituminous" at the present time means the same as semi low volatile and medium volatile bituminous in the standard A. S. T. M.?

A. It would mean the same as the low volatile bituminous group plus part of the medium volatile bituminous coal, but not all of it.

Q. Doctor, assuming coal that has been analyzed, and the analysis of a dry mineral matter free basis shows a fixed carbon content of 87.55 per cent and a volatile matter content of 12.76 per cent and which is nonagglomerating, what, in your opinion, would be the proper classification of that coal?

A. It should be classified in the semianthracite group of the anthracitic class of coal.

Q. Doctor, in your opinion, is there anthracite coal produced outside the State of Pennsylvania?

A. Yes, unquestionable there is anthracite coal produced outside of Pennsylvania.

Q. Do you know of any coal more than 86 per cent fixed [fol. 143] carbon on a dry mineral matter free basis and less than 14 per cent and more than 8 per cent volatile matter that is agglomerating?

A. I don't know of an individual coal that is agglomerating within those limits of volatile matter.

Q. So far as your research has reached, you have found none of that chemical content that is agglomerating?

A. No, we have not found any.

Mr. Adamson: I think that is all.

Mr. Sher: I have no questions.

(Signed) Arno C. Fieldner.

Subscribed and sworn to this 18 day of December, A. D., 1939. (Signed) Lloyd L. Harkins, Notary Public in and for the District of Columbia. My commission expires September 1, 1942. (Seal.)

[fol. 144] THOMAS A. HENDRICKS, a witness of lawful age, was thereupon duly sworn, and, being examined by counsel, testified as follows:

Direct examination.

By Mr. Adamson:

Q. Give your name and your residence.

A. Thomas A. Hendricks, Washington, D. C.

Q. What official position, if any, do you occupy with the Government?

A. I am a geologist with the Geological Survey, United States Department of Interior.

Q. How long have you been a geologist with the Government?

A. Since 1929.

Q. What was your preliminary education in geology?

A. I was graduated from Northwestern University in 1928 with a degree of Bachelor of Science in Geology. I received a degree of Master of Science in geology from Colorado University. I think it was in 1931.

Q. Since your graduation have you been engaged in geologic work?

A. Continuously.

Q. In your work, have you had to deal with the formation of coal, Mr. Hendricks?

A. Yes.

[fol. 145] Q. Has that been your exclusive work?

A. No, not my exclusive work, but the principal work, the geology of coal fields, and other geological problems relating to coal.

Q. Briefly, will you give the theory of the formation of coal?

Mr. Sher: We object to this evidence on the ground that it is incompetent, irrelevant, and immaterial; and on the further ground that this Court is without jurisdiction to hear any question relating to the character of the plaintiff's coal; and on the further ground that all questions relating to the character of the plaintiff's coal have been conclusively determined in the case of *The Sunshine Anthracite Coal Company vs. National Bituminous Coal Commission*, which was tried before the National Bituminous Coal Commission, and on appeal before the Circuit Court of Appeals.

for the Eighth Circuit and certiorari was denied by the United States Supreme Court.

Let the record show that this objection will stand to all evidence relating to the character of plaintiff's coal without the need of making separate objections to each question.

That objection applies to all the testimony of this witness. [fol. 146] Mr. Adamson: That is satisfactory.

The Witness: The commonly accepted theory of the origin of coal is that it has formed from vegetable remains that were deposited under water under conditions that permitted the stagnation so that the vegetable remains would not be destroyed but be preserved; that they were later covered by sand and silt or other inorganic material, and through chemical and physical alteration by heat and pressure were transformed through stages of peat, lignite, bituminous, anthracite, and finally to graphite.

By Mr. Adamson:

— What do you mean by the term "classification of coal"?

A. The classification of coal may be by any one of a large number of different methods; coal may be classified according to age, according to beds.

Q. According to what?

A. According to beds, coal beds, or according to rank in the scale from lignite to anthracite; according to grade, as to impurities and burning characteristics, or according to type, as the ingredients, the vegetable ingredients that are preserved in the coal, and so on.

Q. What I meant by the question, the classification is the designation of the degrees of metamorphosis?

A. The classification according to rank.

[fol. 147] Q. Is a degree of metamorphosis.

A. By classification of coal according to rank is meant the degree of alteration that coal has undergone in the natural sequence between lignite and anthracite.

Q. Mr. Hendricks, is there in general use at the present time in the coal industry generally and the geologic and technical study of coal any standard of classification by rank?

A. I am unable to say with regard to the coal industry in general; the Geological Survey uses for the purpose of classification of coal by rank the A. S. T. M. standard classification of coal by rank.

Some other organizations also use that classification, but I cannot say that it is used by all.

Q. You do not know whether it is in general use in the coal industry?

A. No, I would be unable to answer that.

Q. What are those other organizations that use it, if you know?

A. It has been used in a publication of the Illinois Geological Survey of Coal that Illinois classified in that publication according to that scheme of classification.

It has been used by the National Research Council of Canada in the coals that Canada was classifying in the [fol. 148] publication according to that scheme of classification.

Those are the only ones that I can recall offhand.

Q. Mr. Hendricks, in your geologic work, have you made any study of the coal fields of Arkansas?

A. I have.

Q. You are acquainted with the Spadra Field?

A. I am.

Q. And the coal that is produced in the Spadra Field?

A. Yes, I am.

Q. And has your department had occasion to classify the coal produced in the Spadra Field, Mr. Hendricks?

A. Is that at any time?

Q. Yes.

A. Yes.

Q. I will ask you how you classified that coal or in what classification they place the coal produced in the Spadra Field.

A. The coal produced from the Spadra Field is classified in the publications of the Geological Survey as semi-anthracite.

Q. Now, Mr. Hendricks, is that in the anthracite field or the bituminous field? I mean, if you classify coal as semi-anthracite, does that place it in the anthracite group or the bituminous group?

A. That places it in the anthracite class, the semi-anthracite group of the anthracite class.

[fol. 149] Q. Do you know when the first of these classifications was made?

A. By the Geologic Survey?

Q. Yes.

A. The first that I know of was in 1907.

Q. It was classed at that time as——

A. Semianthracite.

Q. Have there been any subsequent classifications, to your knowledge?

A. In 1913, There is a publication of the Bureau of Mines, a classification by the Geological Survey dealing with coals from the Spadra Field.

Q. How were they classified?

A. Semianthracite; one sample from that field being questionable placed as semianthracite.

Q. Do you know where that sample was taken from?

A. I don't recall; I simply recall that the coal was from Johnson County, Arkansas; I never personally looked up the mine.

Q. Mr. Hendricks, assuming those same figures that are used, of coal that upon analysis on a dry mineral matter free basis shows a fixed carbon content of more than 86 per cent and of volatile matter content less than 14 per cent [fols. 150-152] and more than 8 per cent, what in your opinion, would be the correct classification of that coal?

A. It would—impossible to classify it without——

Q. And was nonagglomerating. I meant to put that in.

A. The coal would be, in my opinion, coal classed as semianthracite.

Mr. Adamson: That is all I wish to ask Mr. Hendricks.

Mr. Sher: I have no questions.

(Signed) Thos. A. Hendricks.

Subscribed and sworn to this 18th day of December, A. D. 1939. (Signed) Lloyd L. Harkins, Notary Public in and for the District of Columbia. My commission expires September 1, 1942. (Seal.)

[fol. 153] PLAINTIFF'S EXHIBIT NUMBER TWO

Mr. Adamson: Now, if the Court please, we offer in evidence Plaintiff's agreement number two, and by agreement, the defendant—Before I get through stating what it is—by agreement defendant waives all questions as to authenticity and formality of proof.

The Court: Is that true?

Mr. Sher: Yes sir.

The Court: Alright.

Mr. Adamson: Then we offer in evidence plaintiff's exhibit number two, which is certified—Not a certified—an analysis of six samples of coal taken from the Sunshine Anthracite Coal Company mine and analyzed by the Commercial Testing and Engineering Company of Chicago, Illinois, which shows the analytical content of the Sunshine Coal Company and its non-agglomerating qualities. (This is off the record.)

The Court: We will hear from the objector, and that will show to what extent you have agreed.

[fols. 154-166] Mr. Sher: The same objection to the offer that we have saved to the deposition. We waived the objection to the proper authentication because in view of the Court's prior ruling, we don't see any need in requiring them to bring witnesses long distances in order to establish the evidence which they could establish if they were here.

The Court: The ruling will be the same and the offer is excluded.

The above documents, being six analysis reports made by the Commercial Testing and Engineering Company of coal samples submitted by Sunshine Anthracite Coal Company, offered in evidence as Plaintiff's exhibit number two, the introduction thereof objected to by defendants, and said documents excluded by the Court, and the same are in words and figures as follows:

Plaintiff's Exhibit Number Two omitted. See pages 25-30 of Vol. II.

[fol. 167] Mr. Adamson: We offer under the same agreement as to authenticity.

The Court: That makes a rather vague record. You will make your offer and then we can have his objections and tell us what he has agreed to.

Mr. Adamson: We offer plaintiff's exhibit number three, which is a report of the investigations and classification chart of typical coals of the United States, showing B. T. U. per pound on the moist, mineral-matter-free basis, plotted against fixed carbon on the dry, mineral-matter-free basis, dated December, 1935, an official publication of the Bureau of Mines, Department of the Interior.

Mr. Sher: We make the same objection to the receipt of this testimony as to the receipt of the deposition, but we waive any objection as to the authenticity.

The Court: Is that sufficient? The ruling will be the same.

The above document offered in evidence as Plaintiff's Exhibit Number Three, was objected to by the defendant and the objection sustained by the Court, the document was excluded, and the same is in words and figures as follows:

PLAINTIFF'S EXHIBIT NUMBER THREE

[fol. 168] R. I. 3296.

December 1935.

DEPARTMENT OF THE INTERIOR

UNITED STATES BUREAU OF MINES

John W. Finch, Director

REPORT OF INVESTIGATIONS

Classification Chart of Typical Coals of the United States

Showing B. T. U. Per Pound on the Moist, Mineral-Matter-Free Basis, Plotted Against Fixed Carbon on the Dry, Mineral-Matter-Free Basis.

(Official Seal of United States Bureau of Mines)

By A. C. Fieldner, W. A. Selvig, and W. H. Frederic

After this report has served your purpose and if you have no further need for it, please return it to the Bureau of Mines, using the official mailing label on the inside of the back cover.

[fol. 169] R. I. 3296,
December 1935.

Report of Investigations

Department of the Interior—Bureau of Mines

Classification Chart of Typical Coals of the United States ¹

Showing B. T. U. per Pound on the Moist, Mineral-Matter-Free Basis, Plotted Against Fixed Carbon on the Dry, Mineral-Matter-Free Basis.

By A. C. Fieldner,² W. A. Selvig,³ and W. K. Frederic⁴

The Sectional Committee on Classification of Coals, functioning under the sponsorship of the American Society for Testing Materials and the rules of the American Standards Association, in its 1934 report recommended to the American Society for Testing Materials⁵ that Specifications for Classification of Coals by Rank be adopted as tentative. These specifications, slightly modified as recommended by the Sectional Committee, in its 1935 report,⁶ were approved as tentative standards by the society in 1935. The specifications cover the classification of coals according to their degree of metamorphism, or progressive alteration, in the natural series from lignite to anthracite. The basic scheme of classification is according to fixed carbon and calorific value (expressed in B. t. u.) calculated to the mineral-matter-free basis. The higher-rank coals are classified according to fixed carbon on the dry basis, and the lower-rank coals [fol. 170] according to B. t. u. on the moist basis, that is, containing its natural bed moisture but free of visible sur-

¹ The Bureau of Mines will welcome reprinting of this paper, provided that the following footnote acknowledgment is used: "Reprinted from U. S. Bureau of Mines Report of Investigations 3296."

² Chief engineer, Experiment Stations Division, U. S. Bureau of Mines, Washington, D. C.

³ Chemist, Pittsburgh Experiment Station, U. S. Bureau of Mines, Pittsburgh, Pa.

⁴ Junior chemist, Pittsburgh Experiment Station, U. S. Bureau of Mines, Pittsburgh, Pa.

⁵ Sectional Committee on Classification of Coals, Report: Proc. Am. Soc. Test. Mat., 1934, part I, p. 463.

⁶ Sectional Committee on Classification of Coals, Report: Proc. Am. Soc. Test. Mat., 1935, Part I, p. —.

face moisture. Agglutinating and weathering indices are used to differentiate between certain adjacent groups.

3463.

R. I. 3296.

Classification by Rank

(a) Fixed Carbon and B. t. u.

In these specifications coals having calorific values of [fol. 171] 14,000 B. t. u. or more on the moist, mineral-matter-free basis and coals having fixed carbon of 69 per cent or more on the dry, mineral-matter-free basis are classified according to fixed carbon on the dry, mineral-matter-free basis; coals having calorific values less than 14,000 B. t. u. on the moist, mineral-matter-free basis are classified according to B. t. u. on the moist, mineral-matter-free basis, provided the fixed carbon on the dry, mineral-matter-free basis is less than 69 per cent.

(b) Weathering Index

Coals showing weathering indices of less than 5 per cent are considered non-weathering; coals showing weathering indices of 5 per cent or more are considered weathering, from the standpoint of classification. The weathering or slacking characteristics are determined by the U. S. Bureau of Mines method,⁷ modified with respect to the selection of a standard humidity of 30 to 35 per cent for air-drying the coal.

(c) Agglutinating Index

Coals having agglutinating indices of 500 g or more at a ratio of 15 parts sand to 1 part coal, by the U. S. Bureau of Mines method,⁸ are considered agglutinating from the standpoint of classification.

Classification Chart

Table 1, taken from the 1934 and 1935 reports of the Sectional Committee on Classification of Coals, gives the [fol. 172] limits of fixed carbon and B. t. u. for classifying coals by rank.

3463.

⁷ Fieldner, A. C., Selvig, W. A., and Frederic, W. H., Accelerated Laboratory Test for Determination of Slacking Characteristics of Coal: Report of Investigations 3055, Bureau of Mines, 1930, 24 pp.

⁸ Selvig, W. A., Beattie, B. B., and Clelland, J. B., agglutinating-Value Test for Coals: Proc. Am. Soc. Testing Materials, vol. 33, part II, 1933, p. 741.

Table 1.—Classification of coals by rank.

[fol. 173 174] R. I. 3296

(Legend: F, C = fixed carbon; V, M = Volatile matter; B, T, u = British thermal units)
Limits of fixed carbon or B. & u., mineral-matter-free basis

Requisite physical properties

Class	Group	Requisite physical properties
I. Anthracite	(1. Meta-anthracite	Dry F, C, 98 percent or more (dry V, M, 2 percent or less)
	(2. Anthracite	Dry F, C, 92 percent or more and less than 98 percent (dry V, M, 8 percent or less and more than 2 percent)
	(3. Semianthracite	Dry F, C, 86 percent or more and less than 92 percent (dry V, M, 14 percent or less and more than 8 percent)
II. Bituminous ²	(1. Low-volatile bituminous coal	Dry F, C, 78 percent or more and less than 86 percent (dry V, M, 22 percent or less and more than 14 percent)
	(2. Medium-volatile bituminous coal	Dry F, C, 69 percent or more and less than 78 percent (dry V, M, 31 percent or less and more than 22 percent)
	(3. High-volatile A bituminous coal	Dry F, C, less than 69 percent (dry V, M, more than 31 percent); and moist ³ B, T, u., 14,000 ⁴ or more.
	(4. High-volatile B bituminous coal	Moist ³ B, T, u., 13,000 or more and less than 14,000 ⁴
	(5. High-volatile C bituminous coal	Moist ³ B, T, u., 11,000 or more and less than 13,000 ⁴
III. Subbituminous	(1. Subbituminous A coal	Moist B, T, u., 11,000 or more and less than 13,000 ⁴
	(2. Subbituminous B coal	Moist B, T, u., 9,500 or more and less than 11,000 ⁴
	(3. Subbituminous C coal	Moist B, t, u., 8,300 or more and less than 9,500 ⁴
IV. Lignite	(1. Lignite	Moist b, t, u., less than 8300
	(2. Brown coal	Moist B, t, u., less than 8300

Consolidated
Unconsolidated.

[fol. 175] ¹ If agglutinating, classify in low-volatile group of the bituminous class.
² Pending the report of the Subcommittee on Origin and Composition and Methods of Analysis, it is recognized that there may be nonagglutinating varieties in each group of the bituminous class.

³ Moist B, t, u. refers to coal containing its natural bed moisture but not including visible water on the surface of the coal.

⁴ Coals having 60 percent or more fixed carbon on the dry, mineral-matter-free basis shall be classified according to fixed carbon, regardless of B, t, u.

⁵ The following are three varieties of coal in the high-volatile C bituminous coal group, namely, variety 1, agglutinating and non-agglutinating; variety 2, agglutinating and non-agglutinating; and variety 3, agglutinating and non-agglutinating.

[fol. 176] R. I. 3296. The Bureau of Mines has cooperated with the Sectional Committee on Classification of Coals in the development of specifications for classification. A previous paper⁹ gives a statistical study of a large number of coals of the United States with a view to establishing suitable boundary lines of fixed carbon and B, t, u. between different ranks of coal. The charts (figs. 1, 2, and 3) in the present paper show the B, t, u. of typical coals of the United States on the moist, mineral-matter-free basis, plotted against per cent fixed carbon on the dry, mineral-matter-free basis. These charts, when used in conjunction with the specifications for classification of coals by rank, as shown in table 1, are a convenient means of showing the position of typical coals of the United States in the scale of rank. The charts are reproduced with sufficient overlapping to permit cutting and pasting together to form a single chart, if desired.

Source of Coals

Table 2 gives the source of the coals shown in the charts and their rank in accordance with table 1. The numbers assigned the coals in the charts are the same as shown in the first column of table 2. The analyses represent standard mine samples collected by the Bureau of Mines method.¹⁰ All of the analyses were made in the laboratories of the Bureau of Mines, except some coals from Ohio, which were analyzed by the Ohio State Geological Survey. Many of [fol. 177] the coals selected were taken from a list of representative coals of the United States compiled by Campbell.¹¹

The last two columns of table 2 give references to published analyses. Analyses heretofore not published are given in table 3.

⁹ Selvig, W. A., Ode, W. H., and Fieldner, A. C., Classification of Coals of the United States According to Fixed Carbon and B, t, u.: Am. Inst. Min. and Met. Eng. Tech. Pub. 527, class F, Coal Division, no. 56, 1934, 11 pp.

¹⁰ Holmes, J. A., The Sampling of Coal in the Mine: Tech. Paper 1, Bureau of Mines, 1918, 22 pp.

¹¹ Campbell, M. R., The Coal Fields of the United States: U. S. Geological Survey Prof. Paper 100-A, 1917, 33 pp.

Computation of Mineral-Matter-Free Analyses

Mineral matter was taken as 1.1 times the ash. The values for fixed carbon and B. t. u. as given in the charts were calculated as follows:

$$\text{Moist fixed carbon} \times \frac{100}{100 - (\text{Moisture} + 1.1 \text{ ash})} = \text{dry, mineral-matter-free fixed carbon}$$

$$\text{Moist B. t. u.} \times \frac{100}{100 - 1.1 \text{ ash}} = \text{moist, mineral-matter-free B. t. u.}$$

[fols. 178-200] Moist, as used in the formulas, refers to the coal containing its natural bed moisture but not including visible moisture on the surface of the coal. For more accurate formulas which apply corrections for the sulphur in the coal, reference should be made to those for fixed carbon and B. t. u. as given in the 1934 Report of the Sectional Committee on Classification of Coals.

Caking Characteristics

Coals designated in the charts as caking or agglutinating produced a coherent coke button in the standard method for determination of volatile matter. Coals designated as non-caking gave a loose powdery residue.

According to table 1, coals coming within the range 11,000 to 13,000 B. t. u. on the moist, mineral-matter-free basis are classified as high-volatile C bituminous coal or as subbituminous A coal, according to their physical properties of agglutination and weathering. Specific information regarding these physical properties was lacking for some of the coals coming within this B. t. u. range, and the rank assigned them in table 2 is that shown in Bureau of Mines coal-analyses publications.

[fol. 201] Mr. Adamson: Now, if the Court please, plaintiff offers in evidence Plaintiff's exhibit number four, which is "Anthracite Outside of Pennsylvania and Semianthracite Tables, 1936, United States Department of the Interior, Harold L. Ickes, Secretary, Bureau of Mines, John W. Finch, Director.

Mr. Sher: We make the same objection, may it please the Court, and we waive any objection as to authenticity.

The Court: The same ruling, it will be excluded.

The above document offered in evidence as Plaintiff's Exhibit Number Four, was objected to by the defendant and the objection sustained by the Court, the document was excluded and the same is in words and figures as follows:

PLAINTIFF'S EXHIBIT NUMBER FOUR

[fol. 202] United States Department of the Interior

Harold L. Ickes, Secretary

Bureau of Mines

John W. Finch, Director

Anthracite Outside of Pennsylvania and Semi-Anthracite
Tables, 1936

By L. Mann

Coal Economics Division

M. van Sieten, Chief Engineer

These tables give the final statistics of production of anthracite outside of Pennsylvania and of semi-anthracite in the calendar year 1936, based upon detailed reports from the mine operators.

Washington, D. C., January 25, 1938.

Please File for Reference until Printed Chapter from Minerals Yearbook is Available.

6323.

(Here follows 1 paster, side folio 203.)

[fol. 203]

Anthracite Outside of Pennsylvania and Semianthracite in the United States in 1936

*Production, Value, Men Employed, Days Operated, Man-Days of Labor, and Output per Man per Day at Anthracite Mines Outside of Pennsylvania and Semianthracite Mines in the United States in 1936

(Includes coal classified as anthracite and semianthracite in Geol. Survey, Prof. Paper 100-A, "The Coal Fields of the United States.")
(Exclusive of product of wagon mines producing less than 1,000 tons).^a

State	Net Tons				Value		Number of Employees			
	Loaded at mines for shipment	Commercial sales by truck or wagon	Other local trade or used by employees, for power and locomotives	Used at mines for heat	Total quantity	Total (thousand dollars)	Average per ton	Underground	Surface	Total
Arkansas	275,415	3,085	1,051	2,741	282,292	\$926	\$3.28	859	188	1,047
Colorado, New Mexico, and Washington	38,416	847	543	7,470	39,776	173	4.35	117	45	162
Virginia	165,951	24,813	150	7,470	198,384	536	2.70	381	136	517
Total 1936	479,782	28,745	1,714	10,211	520,452	1,635	3.14	1,357	369	1,726
Total 1935	411,021	3,365	6,004	2,700	423,090	1,253	2.96	1,355	297	1,652
								146	252	131
								134	226	368
										1.91
										2.06
										1.33
										1.94
										2.35

[fol. 204] ^aThe figures relate only to active mines of commercial size that produced anthracite outside of Pennsylvania and semianthracite in 1936. The number of such mines in these fields in the United States was 41.

^bSize classes of commercial mines in 1936: There were 3 mines in Class 3 (50,000 to 100,000 tons) producing 30.8 per cent of the tonnage; 13 mines in Class 4 (10,000 to 50,000 tons) with 62.2 per cent; 25 mines in Class 5 (less than 10,000 tons) producing 7 per cent.

^cMethod of mining in 1936: The tonnage by hand was 35,648; shot off the solid, 217,468; cut by machines, 206,946; not specified, 300.

^dBased upon (1) the "reported" number of man-shifts where the operator keeps a record thereof; otherwise, upon (2) the "calculated" number of man-shifts obtained by multiplying the average number of men employed underground and on the surface at each mine by the number of days worked by the mine and tripple, respectively. Using throughout the "calculated" man-shifts as developed before the year 1932, namely, the product of the total number of men employed at each mine times the tripple days, the average output per man per day was 2.06 in 1936.

[fol. 205] Number and size of mines.—There were 41 active mines in 1936 in the semi-anthracite and anthracite fields outside of Pennsylvania, as reported to the Bureau of Mines. Of these, 20 were in Arkansas, 2 in Colorado, 2 in New Mexico, 16 in Virginia, and 1 in Washington. In the field as a whole, the classification by size of output is as follows:

NUMBER AND PRODUCTION OF SEMIANTHRACITE AND ANTHRACITE MINES OUTSIDE OF PENNSYLVANIA CLASSIFIED BY SIZE OF OUTPUT IN 1936

Classes	Mines		Total net Tons	Production Average per mine (Net tons)	Per- cent
	Num- ber	Per- cent			
1-A (over 500,000 tons)					
1-B (200,000-500,000)					
2 (100,200-200,000)					
3 (50,000-100,000)	3	7.3	160,261	53,420	30.8
4 (10,000-50,000)	13	31.7	324,098	24,931	62.2
5 (Under 10,000)	25	61.0	36,093	1,444	7.0
Total	41	100.0	520,452	12,694	100.0

Length of working day.—The following table summarizes the replies of mine operators to the question, "Number of hours operated per shift."

In the mines in the semianthracite and anthracite fields outside of Pennsylvania replying to the inquiry in 1936, in [fol. 206]cluding those reporting a day of irregular length, it was found that 70 per cent of the men employed were in 7-hour mines and that the weighted average working shift was 7.3 hours.

The established working day does not of itself measure the length of time that men actually work or the time that they are underground, because of the possibility of overtime, because the mine may sometimes shut down before the full day is over, because the miner may go home before the mine stops, and because he spends a considerable time in going to and from his place of work underground. As interpreted in the wage agreements, the day means the hours of labor at the usual working place, exclusive of any time for lunch and exclusive of the time spent in going from the entrance of the mine to the working place and back again (see Coal in 1930, p. 656).

[fol. 207]

Number of Semianthracite and Anthracite Mines Outside of Pennsylvania Having Established Working Shift of Certain Length and Number of Men Employed Therein, in 1936.

State	7 hours		8 hours		9 hours		Not reporting and all others*		Total	
	Mines	Men	Mines	Men	Mines	Men	Mines	Men	Mines	Men
Arkansas	12	1,022					8	25	20	1,047
Colorado, New Mexico and Washington	4	155					1	7	5	162
Virginia			6	479			10	38	16	517
Total	16	1,177	6	479			19	70	41	1,726

* Includes mines where the day was more than 9 or less than 7-hours or was irregular, or where it was changed during the year; also cases (1) where the operator has included time when the men were entering or leaving the mine, (2) where the operator has reported the time of certain occupations that work longer than other employees, as in stripping overburden, or (3) where the work is staggered and two crews of men overlap. Many of the smaller mines failed to answer the question.

[fols. 208-210]. ANTHRACITE OUTSIDE OF PENNSYLVANIA AND SEMIANTHRACITE LOADED FOR SHIPMENT IN 1936 BY INDIVIDUAL RAILROADS, AS REPORTED BY OPERATORS, IN NET TONS.

Railroads	State	Quantity
Atchison, Topeka & Santa Fe	New Mexico	38,416
Chicago, Milwaukee, St. Paul & Pacific	Washington	
Denver, & Rio Grande Western	Colorado	
Dardanelle & Russellville	Arkansas	101,610
Montana	Arkansas	
Missouri Pacific	Arkansas	
Norfolk & Western	Virginia	44,265
Virginian	Virginia	121,686
Total		479,782

Strikes:

Brief strikes in 1936 were reported by the operators of a few mines in Arkansas, involving some 240 men and averaging about 7 days lost per man on strike and less than 2 days lost per man employed in the anthracite mines of the State. No strikes were reported in the other States in these fields.

[fols. 211-218] Mr. Adamson: Plaintiff offers in evidence Plaintiff's exhibit number five, which is "Anthracite and semi-anthracite outside of Pennsylvania Tables, 1938, United States Department of the Interior, Harold L. Ickes, Secretary, Bureau of Mines, by John W. Finch, Director" issued by the United States Department of the Interior, Bureau of Mines.

Mr. Sher: We make the same objection, and we waive any objection as to authenticity.

The Court: The same ruling.

Exhibit Number Five

The above document offered in evidence as plaintiff's Exhibit Number Five, was objected to by the defendant and the objection sustained by the Court, the document was excluded, and the same is in words and figures as follows: [fol. 219] Mr. Adamson: Co-counsel has just suggested, in

.

order to keep the record, we should make an offer to prove.

The Court: No, I don't think so.

Plaintiff's Exhibit Number Six

Marked for identification.

Mr. Adamson: We offer in evidence Plaintiff's exhibit number six, which is a certified copy of the Findings of Fact and Conclusions of Law, in a hearing before the United States Department of the Interior, National Bituminous Coal Commission, In the Matter of the Application of the Anthracite Coal and Briquetting Corporation, Petitioner, for Designation of Certain Coal as being Anthracite and not Bituminous Coal, being Docket No. 34.

This is a certified copy of the Findings of Fact and Conclusions of Law on a hearing in another case involving, by the old commission, involving a classification under the Act.

Mr. Sher: We make the same objection, if the Court please.

The Court: And there will be the same ruling.

The above document offered in evidence as Plaintiff's Exhibit number six, was objected to by defendant, which objection was by the Court sustained, the document excluded, and the same is in words and figures as follows:

PLAINTIFF'S EXHIBIT NUMBER SIX

[fol. 220] UNITED STATES DEPARTMENT OF THE INTERIOR
National Bituminous Coal Commission

Docket No. 34

In the Matter of the Application of the Anthracite Coal and Briquetting Corporation, Petitioner, for Designation of Certain Coal as being Anthracite and not Bituminous Coal.

Findings of Fact and Conclusions of Law

This matter having duly come on for hearing on the 9th day of April, 1935, before Commissioner George Edward Aeret, pursuant to and for the purposes stated in an order for and notice of hearing dated March 28, 1936, on file herein and D. Gray Langhorne, Esq., appearing on behalf of the petitioner, the Anthracite Coal and Briquetting Corporation and the matter having been submitted, the Commission now makes its findings of fact and conclusions of law as follows:

Findings of Fact

I

The Anthracite Coal and Briquetting Corporation is a corporation duly organized and existing under and by virtue of the laws of the State of Virginia.

[fol. 221]

II

The said corporation is engaged in the business of mining, producing and selling coal in said State.

III.

It is the lessee and operator of a coal mine known as the Empire Mine, located on Little Walker Mount-in, approximately 8 miles northeast of Pulaski, Virginia, in a region generally identified on maps of the United States Geological Survey as the Brushy Mountain Field, under the terms of leases entered into by it on January 1, 1932, with James L. Dent, et al., and May 31, 1935 with The Bertha Mineral Company, a corporation, of New Jersey.

IV.

The property conveyed by said lease and upon which the Empire mine is situated is described as follows:

Tract 1

Situated in Pulaski County, Virginia, on the south side of Walkers Little Mountain and North of Robinson's tract,

and being the Mountain Land inherited by Evelyn K. Mebane, deceased, M. K. Langhorne, deceased, and the said Lizzie K. Laughon and James L. Kent, from their father, D. C. Kent, late of Pulaski County, Virginia, and being the coal on the land, the surface of which was partitioned among the said Lizzie K. Laughon, Evelyn K. Mebane, M. K. Langhorne and James L. Kent by a certain deed dated May 11, 1914, and of record in Pulaski County Clerk's office in deed book 35, page 78, said land partitioned as [fol. 222] aforesaid, on which said coal is situated, being fully described by metes and bounds on a blue print attached to said deed, to which reference is made for a more particular description thereof; and also all the coal of every character and description lying on, in, under and upon a certain other tract of land containing eighty (80) acres, more or less, adjoining the aforesaid land and being a narrow strip situate North of the farm of J. R. K. Bell and west of the lands hereinbefore described and also located on the south sides of the said Walker's Little Mountain, all of said lands being described in a plat attached to a certain deed of lease from the parties of the first part and others to Virginia Anthracite Coal Corporation, dated August 22, 1919, recorded in said Clerk's office in deed book 42, page 470.

Tract 2.

That part of the Thurston tract in said county bounded as follows: Beginning at a poplar, a corner of D. C. Kent, 750 acre tract, and a corner of the Oscar Laughon tract on [fol. 223] which the mineral *are* owned by the Bertha Mineral Company and located on the Southeastern slope of Little Walker Mountain in Pulaski County, Virginia. Thence with the line of the latter tract North twenty six degrees thirty-two minutes west (N. 26-32' W.) fifteen hundred forty feet (1540'); thence leaving the line of the Laughon tract South forty four degrees eighteen minutes West (44-18') twenty eight hundred forty feet (2840'); thence south thirty five degrees East (35.00) fourteen hundred feet (1400') to a point in the southern boundary of the Laughon tract; thence, with the line of the latter, North forty four degrees eighteen minutes East (44.18') twenty five hundred seventy feet (2570.) to the beginning.

Both of the foregoing tracts are set forth with particularity in the maps introduced at the hearing in this cause and identified as petitioner's exhibits No. 14 and No. 15.

V

Underlying the land on which petitioner is the lessee are two beds of coal, known and referred to as the Merrimac bed and the Langhorne bed, the Langhorne bed underlies the Merrimac bed.

VI

All of the coal which the petitioner mines or produces is taken from the Langhorne bed and none from the Merrimac bed.

[fol. 224]

VII

The Technical Committee for the Classification of Coal was organized in 1926 under the sponsorship of the American Society for Testing Materials for the purpose of determining a definite formula for the classification of coal and the establishment of an official table designating the rank of coal based on its findings; included in the membership of said Committee, are representative scientists and technological experts from producer and consumer groups as well as Government representatives from the Bureau of Mines and the United States Geological Survey; the Chairman of said Committee is A. C. Fieldner, Chief Chemist of the Bureau of Mines.

VIII

Said Committee has evolved a formula for determining the classification and rank of coal and a classification table based on the application of said formula.

IX

Said formula determines the fixed carbon content of a given sample of coal calculated on a dry mineral-free basis.

X

The table of classification which it has adopted establishes 86% of fixed carbon on a dry mineral-free basis as the median between anthracitic and bituminous coals.

XI

Coals having a fixed carbon content on a dry mineral-free basis from 86% to 92% are classified and ranked as semi-anthracite and coals whose fixed carbon content on a dry

[fol. 225] mineral-free basis falls below 86% and above 77% are classified as low volatile bituminous (semi-bituminous) coals.

XII

Said committee has also determined that all coals ranked in the anthracite group (86% fixed carbon on a dry-mineral-free basis or above) are non-ag-lomerating and that in doubtful or border-line cases, the ultimate determinant is the ag-lomerating test.

XIII

Nine samples of coal were taken from the Empire Mine operated by the petitioner by representatives of the Bureau of Mines.

XIV

Said samples were subjected to a chemical analysis by the Bureau of Mines and official analyses thereof are on file at the Bureau of Mines.

XV

Under the formula adopted by the Technical Committee for the Classification of Coal, all of said analyses disclose a fixed carbon content on a dry mineral-free basis of more than 86% and less than 92% within an approximate average of 88%.

XVI

All of said samples have been subjected to the agglomerating test by the Bureau of Mines and have been found to be non-ag-lomerating.

[fol. 226] And for conclusions of law, the Commission concludes as follows:

Conclusions of Law

I

That portion of the Langhorne bed which underlies the Empire mine operated by the petitioner and more fully described in finding of fact No. 4 is semi-anthracite coal and not bituminous coal within the meaning of Section 19 of the Bituminous Coal Conservation Act of 1935.

The Anthracite Coal and Briquetting Corporation to the extent that it mines and produces coal from the Langhorne bed of the Empire Mine is not subject to and is exempt from

the provisions of the Bituminous Coal Conservation Act of 1935.

Dated this 13th day of April, 1936.

The undersigned, being the Commissioner and only person who conducted the hearing herein, hereby recommends the adoption by the Commission of the above Findings.

George Edward Acret, Commissioner.

The above Findings are hereby adopted by the National [fol. 227] Bituminous Coal Commission in regular meeting assembled on this 13th day of April, 1936.

C. F. Hosford, Jr., Chairman.

Attest: A true copy. N. W. Roberts, Secretary.

I hereby certify that this is a true and correct copy of the Findings of Fact and Conclusions of Law which were entered in Docket No. 34 of the National Bituminous Coal Commission on April 13, 1936.

(Signed). W. B. Roberts, 3rd, Records Section,
Bituminous Coal Division.

[fol. 228] Mr. Adamson: Mark exhibit number seven.

Plaintiff's Exhibit Number Seven marked for identification.

Mr. Adamson: We offer in evidence Plaintiff's exhibit number seven, being pages 182, 183, 184, 185, 186, and part of 187, of the Fuel Manual, and being a copy of Publication No. 4D issued by the National Fuel Administration in the year 1918.

The Court: It appears to be a part of a bound volume; what is the—

Mr. Adamson: That is the Fuel Manual that was gotten out by the National Coal Commission which contains all of these orders that were issued by the National Fuel Administrator during the War.

The Court: Is that sufficient identification for the record?

Mr. Sher: We make no objection on the ground it is not a true copy—Did you finish your offer?

[fol. 229] Mr. Adamson: I was just saying, this is an offer of the classification; they classified at that time Spadra coal as anthracite coal and set the price.

Mr. Sher: We make the same objection we made to the other offer plus the addition that there is not anything to

show what the standards of classifications were, that were used by the Fuel Administrator during the War, as the additional objection. However, we make no objection on the ground it is not properly identified.

The Court: The same ruling.

The above exhibit introduced in evidence as as Plaintiff's Exhibit Number Seven, the same was objected to by defendant, which objection was sustained by the Court and the exhibit excluded, and the same is in words and figures as follows:

PLAINTIFF'S EXHIBIT NUMBER SEVEN

[fols. 230-245] On April 22 Publication No. 4D was issued. It is entitled "Coal Prices at the Mines, In Effect April 22, 1918." It follows:

United States Fuel Administration

Bituminous Coal

Prices in effect April 22, 1918, F. o. b. mine basis for ton of 2,000 pounds. These prices do not include the 45 cents per ton allowed in President's order of October 27, 1917, Publication 2-A. This increase applies to all mines except those indicated by (*).

The dates on which modifications of prices became effective are given in Publication No. 4-D-1, Series 1918.

[fols. 246-247] ANTHRACITE COAL

The prices for the Bernice mines and Spadra field in the State of Arkansas are as follows (prices f. o. b. mines and nothing to be added):

District	Grate	Egg	Stove	No. 4	Pea	Buck	Slack
Bernice	\$7 30	\$7 55	\$8 30	\$8 30	\$6 30	\$2 85	\$2 50
Spadra	\$6 80	6 80		7 30	4 80		2 50

The prices for all Arkansas anthracite coal, save slack coal, are subject to the following reductions: 90 cents in April, 1918; 75 cents in May, 1918; 60 cents in June, 1918; 45 cents in July, 1918; 30 cents in August, 1918; 15 cents in September, 1918.

[fol. 248] Plaintiff's Exhibit Number Eight marked for identification.

Mr. Adamson: We offer in evidence the plaintiff's exhibit number eight, which is a stipulation entered into between the plaintiff and the defendant.

The Court: In the present case?

Mr. Adamson: In this case. It is a stipulation containing three stipulations covering the formal matter of the list of the coal, also covering assessments that have been made under the 19 $\frac{1}{2}$ % up to the present time, and also the fact that there are no Rules and Regulations in effect at this time.

The Court: I think that is to be read, probably it should be.

Mr. Adamson: With the Court's permission, may I have one of the other men make the statement?

The Court: Oh yes.

Mr. Patterson: (Reads exhibit number eight to the Court).

The above stipulation was read to the Court, and the same is in words and figures as follows.

PLAINTIFF'S EXHIBIT NUMBER EIGHT

[fol. 249] IN THE DISTRICT COURT OF THE UNITED STATES FOR
THE EASTERN DISTRICT OF ARKANSAS, WESTERN DIVISION

In Equity. No. 2949

THE SUNSHINE ANTHRACITE COAL COMPANY

vs.

HOMER M. ADKINS, as Collector of Internal Revenue for the
District of Arkansas

Stipulation

Comes now the plaintiff by its attorneys, and comes also the defendant by his attorneys, and the parties hereto agree that for the purpose of trial and final hearing of this cause, the following facts, in addition to those admitted in the answers, are true, and all parties reserve the right to object to the introduction of any part or portion of this stipulation on the ground that the facts therein contained are

immaterial and irrelevant and not competent evidence in this cause:

1. That the coal mined by the plaintiff is owned by the Ozark Coal Company and leased to plaintiff, and by the terms of said lease plaintiff is required to pay royalty at the rate of 25¢ per ton for each ton of coal mined and removed, and must produce a sufficient amount of coal to pay the owner a minimum royalty of five thousand dollars per year. By supplemental agreement, the royalty has been [fol. 250] reduced to 15¢ per ton for each ton of coal while the mine is in the development stage, the minimum royalty, however, still stands at \$5,000.00 per year.

2. That the defendant here served notice and demand on tax form 17 on the plaintiff herein on the dates and in the amounts as follows: May 3, 1938 in the amount of \$14,031.37, coal tax, \$532.14 penalty, and \$186.23 interest, total \$14,749.64; that on to-wit: May 5, 1938, the said defendant herein filed in the office of the Circuit Clerk and Recorder of Johnson County, Clarksville, Arkansas, notice of tax lien under the internal revenue laws, form 668, in the amount of \$15,487.12, together with a filing fee of \$1.50, totaling \$15,488.62; which said sum, together with taxes for March, 1938 levied and assessed in the sum of \$1,862.95, levied and assessed for April, 1938, \$1,161.65, levied and assessed for the period May, 1938, through October, 1938, in the sum of \$15,807.69, levied and assessed from November, 1938 through April, 1939 inclusive, in the sum of \$25,172.27, and levied and assessed from May, 1939, through September, 1939, in the sum of \$10,573.00, amounts to a total of taxes levied and assessed to this date in the sum of \$70,367.68; that all of the said taxes hereinabove mentioned were levied and assessed by virtue of section 3 (b) of said act; that the plaintiff has refused and continued to refuse to pay said tax or any part thereof.

3. That the National Bituminous Coal Commission by its [fol. 251] order No. 113 issued December 9, 1937, fixed minimum prices and marketing rules and regulations in District No. 14 where plaintiff's mine is located, and the said National Bituminous Coal Commission by its order duly entered revoked minimum prices and marketing rules and regulations for said district 14, as of February 25, 1938; that since the aforesaid date no minimum prices or

marketing rules and regulations under said act have been in force and effect, and no minimum prices or marketing rules or regulations are at the present time in force and effect.

By agreeing to the statements contained in the above stipulations, the parties hereto are not agreeing as to any legal rights resulting therefrom, but said legal rights and regulations are to be determined from the facts set forth in these stipulations and the facts proved at the trial and the law applicable thereto. Any party to this cause shall have the right at the final hearing to introduce any additional or further evidence in this cause, providing that the same is not in contradiction of any of the facts herein stated.

Adamson, Blair & Adamson, Patterson & Patterson.

By (signed) George O. Patterson, Attorneys for Plaintiff. (Signed) Robert E. Sher, Attorneys for Defendant.

[fol. 252] Mr. Adamson: I don't know exactly how to make this record—

Mr. Sher: This probably arises in this way—Mr. Adamson wanted to make an offer to prove as to additional facts as to the properties of the coal by witnesses who would be here, and we agreed that we would permit him to make the offer without having the witnesses present in Court, and he said he didn't know of any such practice, and I told him—

The Court: I see it constantly appearing in records in our Court and it is constantly stipulated if a certain witness was present he would testify as follows.

Mr. Adamson: Now that I understand.

Mr. Sher: We don't go quite that far, of course, if he were—I might suggest, your Honor, that in a certain case there was a line of evidence offered that was objected to by the Government and the objection sustained after considerable argument, and there were thirty witnesses offered to go to that particular question, and we agreed with counsel they could make offer of proof without bringing them to Washington, and that was satisfactory in that case, and [fol. 253] no objection made. I don't want to agree if the witness were here—

The Court: There are certain things he would testify you agree he would testify to?

Mr. Adamson: That has always been our method.

The Court: What is it you say he will testify to; is it written out there?

Mr. Adamson: Yes sir, it is written out and signed by the witness.

The Court: Then you will have to pick out what you think he wont testify to.

Mr. Sher: We object to all of this.

The Court: Sure, and that objection will be preserved.

Mr. Adamson: I cannot see where it would hurt them to make the statement you make; they don't agree that it is [fol. 254] true, it does not bind them in any way, they just simply agree that the witness if present would testify to that particular state of facts.

The Court: Well, they are willing to say that he would testify, but other state of facts they say he would not testify to.

Mr. Adamson: No, they don't object to anything, they say—

The Court: Is that correct; you admit if he were here he would testify to that state of facts?

Mr. Sher: On direct examination.

The Court: If you so admit, then the record must be made that way, and the record shows that it is admitted that if the witness were present, he would testify in chief as stated. Have you numbered the exhibit? (Clerk gives number.) In exhibit number nine, and you can make any statement you want to.

[fol. 255] Mr. Adamson: This is a statement, if the Court please, by Dr. Branner, the State Geologist of the State of Arkansas, in which he sets out his qualifications, his familiarity with the Spadra field, and that it has always been known as anthracite (coal) and classified as anthracite.

Mr. Sher: We will make the same objection without objecting to the authenticity.

The Court: That objection is sustained.

The above statement by Dr. George C. Banner, State Geologist for the State of Arkansas offered in evidence by the plaintiff as Exhibit number nine, and the same was objected to by counsel for the defendant, the objection was sustained by the Court, and the same is in words and figures as follows:

PLAINTIFF'S EXHIBIT NUMBER NINE

[fol. 256] Statement of George C. Branner

My name is George C. Branner. I live at 3121 Ozark Avenue, Little Rock, Arkansas. My business address is 447 State Capitol Building, Little Rock, Arkansas.

I am State Geologist for the State of Arkansas and have been continuously serving in this position since the third day of July, 1923. My preliminary education was obtained at Leland Stanford University from which I graduated in 1915, majoring in geology for three and one-half years and in engineering for two and one-half years. Besides my college education in geology, I occupied the position of Assistant Geologist on the Stanford Scientific Expedition to Brazil in 1911 which was under the direction of John C. Branner, Professor of Geology, at Stanford University. After graduation, I acted as his assistant in private geological work in Arkansas for two years.

I am a member of the Geological Society of America, the Society of Economic Geologists, the American Institute of Mining and Metallurgical Engineers, and am past president of the Association of American State Geologists.

I first began a study of coal in the State of Arkansas about the year 1923 and in the discharge of my duties have had occasion to examine the coal seams and visit certain of the mines in what is known as the Spadra Coal Field in western Arkansas. In making a study of the Spadra field, I have had occasion to calculate the classification of the coals by rank.

[fol. 257] I am familiar with the following systems of classification of coal:

(1) The Frazer System published in 1879 which is based on the ratio of the fixed carbon to the volatile matter determined by the proximate analysis of the coal;

(2) The Frazer system as modified by the so-called Parr formula published in 1928 which uses the proximate and ultimate analyses of the coal to determine the fuel ratios; and,

(3) The A. S. T. M. system published in 1937 which is a refinement of the Frazer system as modified by the Parr formula and, in addition, uses physical differences of coal for calculating the classifications below the medium volatile bituminous group.

The following table shows the comparison of fuel ratios used by the Frazer system and the A. S. T. M. system for the meta-anthracite and anthracite and the semi-anthracite groups:

	Frazer system	A. S. T. M. system
Meta-anthracite and anthracite	12 to 100	11.5 to 100
Semi-anthracite	8 to 12	6.14 to 11.49

The Frazer system achieved common usage and was used in U. S. Geological Survey Professional Paper 100-A, "The Coal Fields of the United States," by Marius R. Campbell, published in 1922. This report definitely classifies coal from [fol. 258] the Spadra District as of semi-anthracite rank (page 27).

I have endeavored to determine the extent to which the A. S. T. M. system is used in other states. From written statements obtained it appears that in 13 states (exclusive of Arkansas) which produce about 85 per cent of the total coal production in the United States, four state geological surveys, viz., Pennsylvania, Illinois, Colorado and Iowa, use the A. S. T. M. system of classification. The remaining nine state geological surveys apparently have not had occasion to give out official classifications of coal produced within their states. Based on conversations with geologists during the past year it is my opinion that the use of the A. S. T. M. specifications is steadily finding wider use.

Of all methods in use for classifying coals, I believe the A. S. T. M. System to be the best method of classification that has been arrived at. The U. S. Geological Survey in April, 1938, urged the adoption of this A. S. T. M. system by "all individuals and groups," generally over the country. This system has also been adopted by the U. S. Bureau of Mines as a standard in its work in classifying coal.

Under the A. S. T. M. system for defining semi-anthracite coal, such coal is defined as that having a content, on a mineral matter free basis, of 86 per cent or more and less than [fol. 259] 92 per cent dry fixed carbon and 14 per cent or less and more than 8 per cent of dry volatile matter. This applies to non-agglomerating coal. If agglomerating, the coal with the content referred to is placed in the low volatile bituminous group.

The mine of the Sunshine Anthracite Coal Company is located in what is known as the Spadra field in Western

Arkansas. Its coal closely approximates the character of coal produced by other mines in the Spadra field. I have been to and in the Sunshine Anthracite Coal Company's mine and have had occasion to examine analyses of coal from the Spadra field. Among these are those included in U. S. Geological Survey Bulletin, 326, "The Arkansas Coal Field," published in 1907; U. S. Geological Survey Professional Paper 100-A, "The Coal Fields of the United States," published in 1922; U. S. Bureau of Mines Technical Paper 416, "Analyses of Arkansas Coals," published in 1928 and U. S. Geological Survey Bulletin 847-E, "Geology and Mineral Resources of the Western Part of the Arkansas Coal Field," published in 1937. The conclusions reached from a study of each one of these analyses are that, under the A. S. T. M. system of classification, the Spadra, Arkansas, coal is of semi-anthracite rank.

[fol. 260] I do not regard the classification of Spadra coal as semi-anthracite as being in any way unusual or unexpected for the reason that, in common with other regions containing coal of the anthracite class, the rocks of the central portion of the Arkansas River Valley in which the Spadra field is located has been subjected to intense folding and the coal has been de-volatilized to a rather high degree for that reason. The intensity of the folding diminishes to the west and the coals diminish progressively in hardness in passing from the eastern end of the Arkansas coal basin into Oklahoma. The coals between the Oklahoma line and the Spadra field are very largely of low volatile bituminous rank and one area, the Bates-Cohdale, produces coal of medium volatile bituminous rank. This is near the Oklahoma line about 60 miles southwest of the Spadra field, and is in the eastern edge of the Oklahoma Coal Basin referred to.

Assuming that a given coal had been analyzed and the analysis on a dry mineral matter free basis showed the fixed carbon content of 87.55 per cent and the volatile matter content of 12.76 per cent, which coal is non-agglomerating, in my opinion, the proper classification for such coal is in the semi-anthracite group of the anthracite class of coal.

[fol. 261] As far as the history of the Spadra, Arkansas, coal field is concerned, to my knowledge, the coal produced in this field where the Sunshine Anthracite Coal Company's mine is located, has been commonly considered semi-anthracite coal by geologists, and also as a matter of trade classi-

fication so far as my knowledge extends as to this usage. In the trade field, it is often referred to as anthracite coal.

The Arkansas Geological Survey report for 1910, entitled "Coal Mining in Arkansas," by A. A. Steel, page 8, refers to the coal in the eastern part of the Arkansas coal field as of semi-anthracite rank.

Signed this 12th day of February, 1940.

(Signed) George C. Branner.

[fol. 262] Mr. Adamson: Now, if the Court please, may we have a short recess? I think we are through.

The Court: The Court will stand recessed; you will indicate when you want it reconvened.

Mr. Adamson: Ten minutes will be enough.

The Court: Then recess for ten minutes.

Here the Court was recessed for ten minutes, after which it reconvened pursuant to order for recess, and proceeded as follows:

The Court: You may proceed.

Mr. Adamson: We rest, your Honor.

Whereupon, the defendant, to sustain the issues upon his part, proceeded as follows:

Mr. Sher: We offer in evidence certified copy of the transcript of the record in the case of the Sunshine Anthracite Coal Company versus Harold L. Ickes, a certified copy by the Clerk of the United States Supreme Court. This was [fol. 263] formerly known as Sunshine Anthracite Coal Company against the Bituminous Coal Commission.

Mr. Adamson: If the Court please, we object for the reason that it is immaterial and irrelevant and for the further reason that it shows upon its face that the parties are not the same, that the subject matter is not the same, and there is an insufficient showing of the jurisdiction of the Court, that is a record at the former proceeding, and we are making the objection as to the whole conclusions and findings and further objection to the evidence contained in there, and to any showing that the witnesses would be unavailable for this hearing.

Mr. Sher: This is right in line with the earlier ruling of the Court, that the pleadings should not be stricken, therefore if the facts can be alleged, they can be proved.

Mr. Adamson: If your Honors please, to be consistent with your former ruling the evidence—

The Court: The objection is overruled, and the exhibit is received in evidence.

[fol. 264] DEFENDANT'S EXHIBIT No. 2

The above exhibit admitted in evidence, and is attached as Vol. II of this transcript.

[fol. 265] Mr. Sher: The parties agree that the United States Supreme Court denied the petition for certiorari in the case of the Sunshine Anthracite Coal Company against Ickes on November 6, 1939.

Mr. Adamson: I do not remember the date, but—

The Court: The record will so show.

Mr. Sher: Now we have here a stipulation which we want to offer.

DEFENDANT'S EXHIBIT NUMBER THREE

The above stipulation marked for identification.

Mr. Adamson: No objection.

Mr. Sher: I will read this to the Court. Now this is a rather lengthy recital of the conditions of the coal industry but I think I ought to read it to the Court.

The Court: Yes, I think so.

The above stipulation admitted in evidence as exhibit number three, the same was read to the Court by Mr. Sher, and is in words and figures as follows:

DEFENDANT'S EXHIBIT NUMBER THREE

[fol. 266] IN THE DISTRICT COURT OF THE UNITED STATES FOR
THE EASTERN DISTRICT OF ARKANSAS, WESTERN DIVISION

In Equity. No. 2949

THE SUNSHINE ANTHRACITE COAL COMPANY, Plaintiff;

v.

HOMER M. ADKINS, as Collector of Internal Revenue for the
District of Arkansas, Defendant

STIPULATION

It is hereby stipulated and agreed by and between the parties, by their respective counsel, that:

1. Practically the entire output of the coal produced by the plaintiff at its mine in Arkansas is sold to purchasers outside the state of Arkansas.

2. It is further stipulated that the following facts with respect to conditions in the coal industry are true:

Bituminous coal is the source of nearly one-half of the energy used in the country. It supplies about 75 per cent of the energy used by the public utilities and in manufacturing. It is essential to the industrial life of the Nation and furnishes a great part of the fuel used for household heating.

It is of great importance to transportation itself. It furnishes about 83 per cent of the fuel used by locomotives operating on the railways. Over a period of years the amount of coal transported by the railroads has ranged from 26 per cent to 33 per cent of their total freight and has furnished from 16 per cent to 19 per cent of the total revenues of the carriers.

[fol. 267] Bituminous coal is found in 26 states of the Union, although the great part of it today is produced in four states: Pennsylvania, Illinois, Kentucky, and West Virginia. It is transported to practically every state in the country, and the coal produced in the different states competes in market with coal produced in other states.

The sales have ranged from nearly 600,000,000 tons down to nearly 350,000,000 tons. About 25 per cent of the total production is sold to interstate commerce carriers. About two-thirds of the remaining production, i. e. 50 per cent of the total production, is sold in interstate commerce, and the remaining 25 per cent of the total production is sold in local commerce.

It is the practice to sell coal before it is mined. In many mines the coal is graded, because the different sizes are more valuable in the market than the run-of-mine coal, and the practice is before operating the mine to obtain contracts for the different kinds of coal. Sometimes it is impossible to get the contracts in advance for all of the sizes, and the mine is compelled to operate.

The unsold coal accumulates until it so clogs the mine that operations are suspended, or that coal is shipped out, consigned to the owner or his agent, in the hope that it will be sold before it reaches its destination. If not, there [fol. 268] are heavy demurrage charges, and there are also

charges due to a change in consignment. So, there is a very decided pressure to sell that coal as quickly as possible, and it is referred to as "distress coal." Sometimes it is offered for sale to a number of brokers at the same time, and so far as the purchasers know, each broker is selling different coal. The result is that distress coal has a very great effect upon the market price and depresses it.

About three-fourths of the coal is sold upon contracts and upon contracts made in advance, while the remaining coal is sold "spot".

There are other differences which distinguish coal to some extent from other commodities. The cost of the labor is the greatest item in producing coal. It is about 60 per cent.

The closing down of a mine is a difficult and very expensive thing. The pumps must be kept going, and there are various items of supervision such as to see that the walls and ceilings do not collapse, and the result is that the expense of running the mine while it is not operating is so heavy that it is usually considered cheaper to keep the mine going, even though the price received for the coal is less than the actual cost if all items of overhead are taken into consideration.

[fol. 269] There is a very great over-capacity in the mines of the country. The mines are capable of producing a much greater amount of coal than is consumed.

During the War the demand for coal grew enormously, with the result that prices soared. Finally Congress passed legislation for the purpose of regulating the price of coal, but it was some months after the Fuel Administration began to operate before the difficulties were corrected.

After the War there were a number of strikes of some importance. Wage agreements had usually been made for a period of two years, and there was always likely to be some suspension at about the time of the termination of the wage agreement. Frequently it was not renewed before the expiration.

In 1919 there did occur a very serious strike. That was a general strike of the union miners. It began about November 1, 1919, and lasted for about six weeks. Some 400,000 men altogether were on strike in about 22 different states. Before that strike was over, manufacturers in some places had to close down because of the shortage of coal.

In 1920, before the effects of that strike were over, the Government undertook to fix the prices of coal again.

In 1920 or 1921, the President appointed a Coal Commission which undertook to study the difficulties between the operators and the miners.

[fol. 270] In 1922 another suspension occurred at the expiration of the wage agreement on March 31, 1922. About 460,000 miners were out, and at one time about 73 per cent of the productive capacity of the mines was closed down.

On September 22, 1922, Congress passed an act which created the office of Federal Fuel Distributor, and also appointed the United States Coal Commission, which made an investigation.

During that suspension the price of coal increased, and some buyers were unable to get the grades of coal to which they were accustomed. Some of the coal sold was impure, and there were some breakdowns on some of the locomotives on the railroads. At both of those times there was a real threat of a suspension, not only of the commerce of coal itself; but of the commerce which depended on the use of coal in order to move; and that threat was overcome by the action of the President in one case and of Congress in the other.

Between 1924 and 1927 there were a number of local strikes or suspensions, and after the expiration of the Jacksonville agreement in 1927 there were still other suspensions.

Prior to 1917 the industry had grown a great deal. Even before that time, and from that time on, there had been a very great growth in Kentucky, West Virginia, and some southern states, some due to natural causes—the [fol. 271] building of the railroads to the mines and the building up of the mines—and some due to the competitive conditions.

Between 1924 and 1927 a great many of the union mines abrogated their contracts or suspended operations and later reopened on a non-union basis. As a result, a great deal of the sales of the mines that had been union before that time went to the mines in the other states that had been non-union.

By 1927, after the expiration of the Jacksonville agreement, practically all of the territory, or the very great part of the territory, that had theretofore been union, became non-union, and thereafter some of this commerce which had gone to Kentucky and West Virginia then went back in the normal course to Pennsylvania, Illinois, and the other states.

Between 1924 and 1929, there was no decrease in the sales of coal; the sales were over 500,000,000 tons in each one of those years.

From 1917 up to about 1923, the business as a whole had been very profitable. There were some years when the net profits of the entire industry were in the neighborhood of \$250,000,000. In that year the wages were about \$850,000,000 and the sales were nearly double that, or around \$1,500,000,000. During this period from 1924 to 1929, when the production continued at about the same amount [fol. 272] there were heavy losses. Between 1924 and 1929, there was a loss in every year to the industry as a whole.

During that same period the average price at the mine decreased from \$2.68 to \$1.78, a decrease of 90 cents, or about 31 per cent. During the same period the total wages decreased from about \$850,000,000 to \$588,000,000, a decrease of about the same percentage. The number of miners decreased about 200,000. So, with the same production, this meant that the miners were working more days per year.

Also during that same period, the approximate period between 1923 and 1929, the number of mines decreased about 3,300, about 30 per cent.

The losses after 1929 became heavier, and they continued to be very heavy until the year 1934, when the N. R. A. became effective.

Throughout this same period Congress made a large number of investigations—either Congress itself, through a committee, or through some body appointed by Congress, or a commission appointed by the President. There were 12 or 14 of those during the period from 1918 down to 1935, and various suggestions as to various remedies were made.

During this period from 1919 down to the adoption of N. R. A., there were a number of things which were injurious to the commerce in coal, and to the entire commerce of the nation. Whenever a wage agreement expired there was a threat, or at least a fear, that a very substantial part, if not all, commerce might be suspended until the wage agreement should be renewed. In 1920 and 1922 these threats grew to very serious proportions. The Presidents exercised their good offices, and Congress passed a statute as a result of which investigations were made, and the suspensions ceased and commerce in coal was renewed, and the threat of interference with that commerce,

and with the bulk of the commerce of the railroads, ceased, but there was that threat on each occasion. As it was, there were many interruptions to the commerce, and real obstructions to the commerce. Consumers were compelled to lay in stocks of coal. Of course, the commerce of the carriers themselves fell off. Prices increased. Certain of the carriers in 1920 paid about 25 per cent more for their contract coal and about 50 per cent more for their spot coal than they paid during the preceding year, and they probably suffered less because of their great buying ability, than other consumers.

By agreeing to the statements contained in the above stipulations, the parties hereto are not agreement as to any legal rights resulting therefrom, but said legal rights and relations are to be determined from the facts set forth in these stipulations and the facts proved at the trial and the law applicable thereto. Any party to this cause shall have [fols. 274-275] the right at the final hearing to introduce any additional or further evidence in this cause, providing that the same is not in contradiction of any of the facts herein stated.

Patterson & Patterson, Adamson, Blair & Adamson,
Attorneys for Plaintiff. Robert E. Sher, Harold
—, Attorneys for Defendant.

[fols. 276-277] WAIVER OF OBJECTION TO JURISDICTION, ETC.

Mr. Sher: I would like to have the record to show that the Government waives its objections to the equitable jurisdiction of the Court and waives its defense under Section 3224 of the Revised Statutes.

[fol. 278] ♦File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL—Filed March 4, 1940

Comes now the plaintiff, The Sunshine Anthracite Coal Company, and feeling itself aggrieved by the final decree

of the Court entered herein on the 16th day of February, 1940, prays an appeal therefrom to the Supreme Court of the United States. The particulars wherein it considers the final decree erroneous are set forth in its assignment of errors on file and to which reference is made.

Wherefore, the premises considered, your petitioner prays that an appeal in its behalf to the Supreme Court of the United States for the correction of the errors complained of and herewith duly assigned, be allowed and granted; and that an order be had fixing the amount of the bond and security to be given by this plaintiff as appellant and conditioned as the law directs, and it prays a reversal of said decree.

The Sunshine Anthracite Coal Company, by Henry Adamson, George O. Patterson, Attorneys.

[fol. 279] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF APPEAL Filed March 4, 1940

The defendant in the above entitled case is hereby notified that the plaintiff has appealed from the decree of the court as rendered on the 16th day of February, 1940, and that said appeal will be to the Supreme Court of the United States, in accordance with the citation as issued in this case.

The Sunshine Anthracite Coal Company, by Henry Adamson, George O. Patterson, Attorneys.

Service of the above notice of appeal accepted this the 4th day of March, 1940:

Sam Rorex, U. S. Attorney, of Counsel for Defendant, by (S.) Leon B. Catlett, Asst. U. S. Attorney.

[File endorsement omitted.]

[fol. 280] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER GRANTING APPEAL—Filed March 4, 1940

It appearing to the Court in the above cause that the plaintiff herein has filed its petition for appeal to the Su-

preme Court of the United States, and has filed therewith its assignment of errors, and also its statement as to the jurisdiction of the Supreme Court, duly disclosing that the Supreme Court of the United States has jurisdiction, upon appeal, to review the decree in question.

It Is Hereby Ordered by the Court that the appeal prayed for be and the same is hereby allowed and granted to the Supreme Court of the United States from the decree rendered in said cause on the 16th day of February, 1940, and that said plaintiff give bond with good and sufficient surety in the sum of Two Hundred Fifty (\$250.00) dollars that it will, as appellant, prosecute its appeal to effect and answer all damages and costs if it fails to make its appeal good; and now plaintiff files herein its bond in the sum of \$250.00 conditioned as above set out, with the Fidelity and Casualty Company of New York, as surety thereon, and said bond is now accepted and approved.

Dated March 4th, 1940:

(Signed) Harry J. Lendley, District Judge.

[fols. 281-283] Bond on appeal for \$250.00 approved and filed March 4, 1940, omitted in printing.

[fol. 284] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENTS OF ERROR—Filed March 4, 1940

Comes now the plaintiff, The Sunshine Anthracite Coal Company, and in connection with its petition for appeal, files the following assignments of error on which they will rely on their appeal to the Supreme Court of the United States from the final decision of the three-judge District Court entered the 16th day of February, 1940.

The three-judge District Court erred:

1. In overruling plaintiff's motion to strike out of defendant's answer those paragraphs of defendant's answer setting up and alleging proceedings, findings and order before the National Bituminous Coal Commission determining that plaintiff's coal and all coals produced in the Spadra coal field in Johnson County, Arkansas, to be bitu-

minous coal within the meaning of the Bituminous Coal Act of 1937.

2. In excluding, upon objection, plaintiff's evidence of characteristics, nature and prior technical meaning given to the words "bituminous, semi-bituminous and sub-bituminous" by other departments of the government of the United States and by the former National Bituminous Coal Commission.

3. In admitting in evidence, over plaintiff's objection, certified transcript of proceedings had and held before the National Bituminous Coal Commission for the purpose of [fol. 285] determining whether or not certain coals in the State of Arkansas are subject to the provisions of the Bituminous Coal Act of 1937, and for the purpose of hearing applications for exemption, including that filed by The Sunshine Anthracite Coal Company.

4. In holding, in Conclusion of Law No. 3, that the District Court had no jurisdiction to determine whether "Plaintiff's coal is bituminous coal", as defined by the Bituminous Coal Act of 1937. Under Section 4-A and section 6 of the Act; the findings and order of the National Bituminous Coal Commission declared plaintiff's coal to be "bituminous coal" within the meaning of the Act, was an order which the Commission had jurisdiction to make, and which can be reviewed only by a Circuit Court of Appeals.

5. In holding, in Conclusion of Law No. 4, that in any event the issue whether plaintiff's coal is "bituminous coal" as defined by the Act has already been conclusively determined against plaintiff by a former proceeding in which the National Bituminous Coal Commission denied plaintiff's application for exemption from the Act.

6. In holding, in its Conclusion of Law No. 5, that section 3(b) of the Act imposes a tax upon producers of bituminous coal in interstate commerce who do not subscribe to the Bituminous Coal Code.

7. In holding, in its Conclusion of Law No. 6, that the Bituminous Coal Act of 1937, c. 127, 75th Congress, first session, 250 Statutes 72, is constitutional.

8. In holding, in its Conclusion of Law 6(a) that the regulatory provisions in section 4 of the Bituminous Coal Act

of 1937 are a valid exercise of the power of Congress to regulate interstate commerce and intrastate commerce directly affecting interstate commerce.

9. In holding, in its Conclusion of Law 6(b) that the establishment of prices for bituminous coal sold in interstate commerce or intrastate commerce directly affecting interstate commerce is reasonable, is related to a proper [fol. 286] congressional purpose and does not violate the Fifth Amendment.

10. In holding, in its Conclusion of Law 6(c), that the standards of the Bituminous Coal Act of 1937 are sufficiently definite, and that said act contains no invalid delegation of legislative authority.

11. In holding, in its Conclusion of Law 6(d), that whether or not the taxing provisions of section 3(b) could be otherwise sustained, since the regulatory provisions of the act are valid, the taxing provisions of the act are likewise valid as affecting the valid regulatory purpose of the act.

12. In holding, in its Conclusion of Law 6(e), that the exemption from the tax imposed by section 3(b) of the producers who subscribe to the Bituminous Coal Code, and are subject to the regulatory provisions of section 4, does not constitute an arbitrary classification contravening the Fifth Amendment.

13. In holding, in its Conclusion of Law No. 7, that the bill of complaint should be dismissed.

14. In refusing to make the temporary injunction heretofore granted permanent.

Henry Adamson, George O. Patterson, Attorneys for Plaintiff.

[File endorsement omitted.]

[fol. 287] Citation in usual form showing service on Sam Rorex, filed March 4, 1940, omitted in printing.

[fol. 288]

[File endorsement omitted]

IN UNITED STATES DISTRICT COURT

, [Title omitted]

PRAECIPE FOR TRANSCRIPT OF RECORD—Filed March 4, 1940

Comes now the plaintiff herein, and for the purposes of the appeal which has been allowed herein to the Supreme Court of the United States, requests the Clerk to prepare and forward to the Clerk of the Supreme Court of the United States at Washington, D. C., a transcript of the record in the above entitled cause, and to include in said transcript the following:

1. All pleadings and motions filed herein, and all rulings and orders entered by the court, including the order granting temporary injunction herein.

2. The court order constituting the three-judge court under the provisions of the United States Code Annotated, Title 28, Section 380(a).

3. All evidence introduced and offered at the trial herein.

4. Court's findings of fact and conclusions of law, filed herein on February 16, 1940.

5. Court's final decree herein, entered February 16, 1940.

6. Plaintiff's Petition for Appeal, filed herein March 4, 1940.

7. Plaintiff's Assignment of Errors, filed herein accompanying Petition for Appeal on the 4th day of March, 1940.

[fol. 289] 8. Plaintiff's Statement as to the jurisdiction of the Supreme Court, filed herein March 4, 1940, accompanying Petition for Appeal.

9. Court's order of March 4, 1940, allowing appeal and fixing bond and approving bond.

10. Citation to defendant and acceptance of service, filed herein on March 4, 1940.

11. Notice of Appeal to defendant and acceptance of service thereon, filed herein March 4, 1940.

12. Acceptance by defendant of service of copies of petition for an order allowing appeal, together with copy of Plaintiff's Assignment of Errors, plaintiff's statement of jurisdiction of the Supreme Court of the United States, and statement calling defendant's attention to the provisions of

Rule 12, paragraph 3 of the Revised Rules of the United States Supreme Court.

13. Otherwise a full and complete record of the proceedings herein.

14. A copy of this praecipe.

Henry Adamson, George O. Patterson, Attorneys for Plaintiff.

[fol. 290] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

COUNTER-DESIGNATION—Filed March 8, 1940

Comes now the defendant, Homer M. Adkins, as Collector of Internal Revenue for the District of Arkansas, by Sam Rorex, United States Attorney for the Eastern District of Arkansas, and requests that there be incorporated in the transcript of the record in the above styled case the following papers, to-wit:

1. Opinion of the Court.

(Signed) Sam Rorex, United States Attorney for the Eastern District of Arkansas, by (S.) Leon B. Catlett, Asst. U. S. Attorney.

[fol. 291] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 292] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY—Filed March 12, 1940

Comes now the appellant herein and pursuant to rule 13, paragraph 9, files with the clerk his statement of points on which he intends to rely as follows: All points set out in the assignment of errors heretofore filed herein.

Henry Adamson, Attorney for Appellant.

We hereby acknowledge service of the above designation this 12th day of March, 1940.

Francis Biddle, Solicitor General.

[fol. 293] IN SUPREME COURT OF THE UNITED STATES

STIPULATION AS TO PRINTING OF THE RECORD—Filed March
12, 1940

It is hereby stipulated by and between the Solicitor General, on behalf of the appellee, and the attorney for appellant in the above entitled cause that in order to reduce the size of the record and the cost of its printing, the clerk of the Supreme Court in printing the record may reduce its size as follows:

- (1) Eliminate verification (R. 23).
 - (2) Eliminate all of R. 25 and substitute "Order designating three-judge court signed by Kimbrough Stone, senior Circuit Judge".
 - (3) Eliminate verification, at bottom of R. 32.
 - (4) Eliminate order granting leave to file supplement to answer (R. 34) but retain the heading.
 - (5) Eliminate R. 39 but retain the heading.
 - (6) Immediately following R. 42 print opinion of court on motion to strike, now included within the Jurisdictional Statement and found at R. 697-706.
 - (7) Eliminate R. 44.
 - (8) Eliminate R. 60 starting with words "The court" on line 4, down to words "George A. Merchant" on line 3, R. 61.
- [fol. 294] (9) Eliminate defendant's Exhibit 1 appearing at R. 89-101, inc.
- (10) Eliminate notary's certificate appearing at R. 135-136, inc.
 - (11) Eliminate plaintiff's Exhibit No. 2 appearing at R. 139-150, inc. (indicating that these documents are found at pp. 25-30, inclusive, of the printed transcript of the record in Sunshine Anthracite Coal Co. v. Ickes, October Term, 1939, No. 410, which is a part of this record).
 - (12) Eliminate entirely R. 162-177-F, inc.
 - (13) Eliminate entirely R. 185-186, inc.
 - (14) Eliminate entirely R. 188-195, inc.

(15) Eliminate R. 207, starting with "Alabama" in line 12, down to words "Anthracite Coal", line 8, R. 223.

(16) Eliminate R. 223 starting with "Pennsylvania Anthracite Coal" at bottom of page, and all of R. 224.

(17) Eliminate defendant's Exhibit No. 2, R. 256-675, inc., which is the certified transcript of record in this Court in Sunshine Anthracite Coal Co. v. Ickes, October Term, 1939, No. 410, it being understood that the printed records on file in that case may be used as a part of the record in this case without reprinting. This should be indicated immediately following R. 241.

(18) Eliminate all of R. 252 and all of R. 253 except last paragraph beginning with "Mr. Sher".

(19) Eliminate certificate of court reporter appearing at R. 254.

Dated this 12th day of March 1940.

Henry Adamson, Attorney for Appellant; Francis Biddie, Attorney for Appellee.

[fol. 295] [File endorsement omitted.]

Vol. II
TRANSCRIPT OF RECORD

Defendant's Exhibit No. 2

Supreme Court of the United States

OCTOBER TERM, 1939

No. 804

**THE SUNSHINE ANTHRACITE COAL COMPANY,
APPELLANT,**

vs.

**HOMER M. ADKINS, AS COLLECTOR OF INTERNAL
REVENUE FOR THE DISTRICT OF ARKANSAS**

**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE EASTERN DISTRICT OF ARKANSAS**

FILED MARCH 12, 1940.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No.

SUNSHINE ANTHRACITE COAL COMPANY,
PETITIONER,

vs.

HAROLD L. ICKES, AS SECRETARY OF THE IN-
TERIOR AND HOWARD A. GRAY, AS DIRECTOR
OF THE BITUMINOUS COAL DIVISION OF THE
DEPARTMENT OF THE INTERIOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
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[fol. 1]

**UNITED STATES DEPARTMENT OF THE INTERIOR,
NATIONAL BITUMINOUS COAL COMMISSION,
WASHINGTON, D. C.**

ORDER No. 28

An Order Providing for the Determination of the Character of Any Coal and the Issuance of Certificates of Exemption to Producers of Coals Other Than Bituminous, Semi-bituminous and Subbituminous.

Whereas the act of Congress entitled "An Act to regulate interstate commerce in bituminous coal, and for other purposes" (Public, No. 48, 75th Cong., 1st sess.), known as the Bituminous Coal Act of 1937, stipulates (section 17 (b)) that "the term 'Bituminous Coal' includes all bituminous, semi-bituminous and subbituminous coal and shall exclude lignite, which is defined as a lignitic coal having calorific value in British thermal units of less than seven thousand six hundred per pound and having a natural moisture content in place in the mine of 30 per centum or more", and,

Whereas, it is desirable that a method be provided whereby producers of coal may secure a determination of their status under the Bituminous Coal Act of 1937 and, if such coal is not bituminous, as defined in said Act, to receive a certificate of exemption:

Now, Therefore, to facilitate the administration of said Act and pursuant to its power to make and promulgate all reasonable rules and regulations for carrying out the provisions of the Act, the National Bituminous Coal Commission orders and directs:

1. That any producer of coal may, upon application to the Commission and upon presentation of proper evidence in support of such application, if required by the Commission, secure a finding by the Commission as to whether or not such coal is bituminous, as defined in said Act, and if it is not bituminous, secure a certificate from the Commission showing such fact.

2. Each such application shall be filed with the Commission in triplicate, shall be duly verified by affidavit and shall include the following:

- (a) The name and post office address of the applicant and, if said applicant is not the owner of the mining opera-

tions or the coal lands involved, the name and post office address of such owner or owners.

(b) The designation and exact location of the mine or mines where the coal is produced, including the state, county and township and producing field or fields.

[fol. 2] (c) A statement showing the tonnage produced in each of the calendar years 1934, 1935 and 1936 and the tonnage by months for the first six months of 1937.

(d) A statement showing the localities in which such coal is being marketed, together with the names and post office addresses of not less than three (3) persons or firms who are substantial consumers of such coal and are familiar with its qualities and characteristics.

(e) A full description of the seam or seams of coal in which mining operations are being conducted and for which exemption is claimed, including analyses of such coal, where available, made by competent persons or authorities satisfactory to the Commission, and such other information as will tend to show the character of the coal as to whether or not it is bituminous, semibituminous or subbituminous.

(f) A reference to publications and reports of agencies of the United States or State Governments, describing the characteristics and classification of the coal in question.

3. In the case of any such application the Commission may, in its discretion, require the submission of further data, and may also conduct a hearing upon reasonable notice at which the petitioner may be required to submit additional evidence in support of the claim for exemption.

4. In each such case, if the Commission finds from the evidence that the coal is not bituminous, as defined in the Act, a certificate of exemption may be issued, which certificate shall be proper evidence that the Commission has exempted the petitioner in respect of the coal covered by such certificate from the operation and effect of said Act.

5. Under the direction of the Secretary of the Commission a copy of this order shall be mailed to the Consumers' Counsel, to the Commissioner of Internal Revenue, and to each District Board, and copies hereof shall be made available to all interested persons upon application to the sta-

tistical bureaus of the Commission established for the several districts under the provisions of the Act. The Secretary shall also cause this order to be published for three (3) successive days in a newspaper of general circulation in each of the districts created under said Act.

By order of the Commission.

Dated this 27th day of July, 1937.

F. Witcher McCullough, Secretary. (Seal.)

[fol. 3] CITY OF WASHINGTON,
District of Columbia, ss:

AFFIDAVIT OF PROOF OF PUBLICATION

E. J. Earley, being first duly sworn, on his oath deposes and says: That he is an employee of the National Bituminous Coal Commission and is immediately attached to the office of the Secretary; and that he caused to be and there was published in the Federal Register in the issue of the said Federal Register, dated the 29th day of July 1937, and being Number 145 of Volume 2 at Page 1581 of said Federal Register, Order No. 28, "An Order Providing for the Determination of the Character of any Coal and the Issuance of Certificates of Exemption to Producers of Coals other than Bituminous, Semibituminous and Subbituminous," a true and correct copy of which is attached hereto and made a part hereof.

/s/ E. J. Earley.

Subscribed in my presence, and sworn to before me this 4th day of November, 1937.

Sherman E. Rurt, Notary Public. (Title.) (Seal.)

My Commission Expires August 22, 1942.

(Here follow 7 photolithographs, side folios 4-10))

BEFORE NATIONAL BITUMINOUS COAL COMMISSION
APPLICATION OF

SUNSHINE ANTHRACITE COAL CO.

CLARKSVILLE, ARKANSAS

Chicago Office
230 North Michigan Avenue

August 31, 1937

United States
Department of the Interior
National Bituminous Coal Commission
Washington, D. C.

Gentlemen:

Pursuant to Order No. 28, "AN ORDER PROVIDING FOR THE DETERMINATION OF THE CHARACTER OF ANY COAL AND THE ISSUANCE OF CERTIFICATES OF EXEMPTION TO PRODUCERS OF COALS OTHER THAN BITUMINOUS, SEMI-BITUMINOUS, AND SUB-BITUMINOUS", we herewith apply for a certificate exempting our Arkansas Anthracite coal from the operation and effect of the Bituminous Coal Act of 1937, "AN ACT TO REGULATE INTERSTATE COMMERCE IN BITUMINOUS COAL, AND FOR OTHER PURPOSES." The Act stipulates (Section 17 (b)) that "the term 'Bituminous Coal' includes all bituminous, semi-bituminous, and sub-bituminous coal and shall exclude lignite, which is defined as a lignitic coal having calorific value in British thermal units of less than seven thousand six hundred per pound and having a natural moisture content in place in the mine of 30 per centum or more."

Arkansas coal from the Spadra field has been known and sold as anthracite coal for over thirty years. However, it would be classified as "semi-anthracite" according to the American Society for Testing Materials Classification of Coals by Rank shown on Page 68 of their bulletin published in September 1934 for Committee D-5 on Coal and Coke. Class I Anthracitic, Group 3 Semi-anthracite specified the limits of fixed carbon or B.T.U. mineral-matter-free basis "Dry Fixed Carbon, 86 percent or more and less than 92 percent (Dry Volatile Matter, 14 percent or less and more than 8 percent)" with requisite physical properties "Non-agglutinating."

Pursuant to Order No. 28, "AN ORDER PROVIDING FOR THE DETERMINATION OF THE CHARACTER OF ANY COAL AND THE ISSUANCE OF CERTIFICATES OF EXEMPTION TO PRODUCERS OF COALS OTHER THAN BITUMINOUS, SEMI-BITUMINOUS, AND SUB-BITUMINOUS", we herewith apply for a certificate exempting our Arkansas Anthracite coal from the operation and effect of the Bituminous Coal Act of 1937, "AN ACT TO REGULATE INTERSTATE COMMERCE IN BITUMINOUS COAL, AND FOR OTHER PURPOSES." The Act stipulates (Section 17 (b)) that "the term 'Bituminous Coal' includes all bituminous, semi-bituminous, and sub-bituminous coal and shall exclude lignite, which is defined as a lignitic coal having calorific value in British thermal units of less than seven thousand six hundred per pound and having a natural moisture content in place in the mine of 30 per centum or more."

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Following is the information called for in Order No. 28:

- 2(a) Name of Applicant - Sunshine Anthracite Coal Company
P. O. Address - Clarksville, Arkansas
- (b) Name of Mine - Sunshine
Location - Clarksville, Johnson County, Arkansas
Field - Spadra

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Department of the Interior
National Bituminous Coal Commission
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(c) Tonnage Produced -

<u>1934</u>	November	-	68.85 Tons
	December	-	1,211.75 "
<u>1935</u>	Total	-	17,624.07 "
<u>1936</u>	Total	-	10,935.05 "
<u>1937</u>	January	-	1,436.20 "
	February		37.55 "
	March		412.65 "
	April	-	- - -
	May	-	- - -
	June	-	- - -
	Total		<u>1,886.40 Tons</u>

(d) The coarse coal from this mine has been sold for domestic heating purposes generally throughout the central west. For example, we have sold coarse coal to the Leighton Fuel Company, Minneapolis, Minnesota, and to the Gray-Bryan-Sweeney Coal Company, Kansas City, Missouri. All have advertised and sold this coal as Arkansas Anthracite.

We have sold our slack or fine coal to the following smelters who buy the Arkansas Anthracite because they must have a coal which is non-agglutinating:

The Ozark Smelting and Mining Co., Coffeyville, Kansas
Eagle-Picher Smelting and Mining Co., Henryetta, Oklahoma

We have also sold slack or fine coal for several years to the Standard Briquet Fuel Company, (since July 1, 1935, Birkley Coal Company (Briquet Plant)), Kansas City, Missouri, to make a free-burning or non-agglutinating briquet.

We have also furnished through the Binkley Coal Company 5" x 2" egg coal to the Quartermaster, Fort Shelling, Minnesota, bidding on standard bid form specifically calling for Arkansas Anthracite. (See exhibit B).

(d) The coarse coal from this mine has been sold for domestic heating purposes generally throughout the central west. For example, we have sold coarse coal to the Leighton Fuel Company, Minneapolis, Minnesota, and to the Gray-Bryan-Sweeney Coal Company, Kansas City, Missouri. All have advertised and sold this coal as Arkansas Anthracite.

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We have also furnished through the Binkley Coal Company 5" x 4" egg coal to the Quartermaster, Fort Snelling, Minnesota, bidding on standard bid form specifically calling for Arkansas Anthracite. (See exhibit B).

We have also shipped 5-1/2" x 2-1/2" egg coal to the Quartermaster, Scott Field, Belleville, Illinois, bidding on United States Government forms calling for Arkansas Anthracite. (See exhibit C).

(e) The coal seam at the Sunshine Mine varies in thickness from 51" to 56". University of Arkansas Engineering Experiment Station Bulletin No. 5 dated November 1928 has this to say about Arkansas Anthracite: "Arkansas Anthracite is produced in Johnson and Pope Counties, and is strictly a domestic coal."

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It is smokeless and is adapted to furnace, grate, ranges, and water heaters."

Two Bureau of Mines' analyses covering shipments of a total of 1,834.35 tons of 5" x 2" Sunshine egg coal to Fort Snelling, Minnesota, from August 12 to September 5, 1935, are shown:

BUREAU OF MINES' ANALYSES

Date	September 16, 1935		September 23, 1935		Average	
Sample No.	1		2			
No. Tons	926.25		908.1			
	<u>As Recd.</u>	<u>Dry</u>	<u>As Recd.</u>	<u>Dry</u>	<u>As Recd.</u>	<u>Dry</u>
Moisture.....	1.7	- -	2.0	- -	1.9	- -
Ash.....		9.4		9.7		9.6
Volatile Matter		12.9		13.2		13.0
Fixed Carbon...		<u>77.7</u>		<u>77.1</u>		<u>77.4</u>
		100.0		100.0		100.0
B.t.u.	13,700	13,930	13,680	13,950	13,675	13,940
Sulphur.....		2.2		2.2		2.2

Dry Mineral-Matter-Free Basis

Volatile Matter	12.9
Fixed Carbon	<u>87.1</u>
	100.0
B.t.u.	15,633

From the analysis on a dry mineral-matter-free basis, it will be noted that Sunshine Anthracite coal has a fixed carbon content of 87.1% or 1.1% more than necessary to cause it to fall within the semi-anthracite classification.

BUREAU OF MINES' ANALYSES

Date	September 16, 1935		September 23, 1935		Average	
Sample No.	1		2			
No. Tons	926.25		908.1			
	<u>As Recd.</u>	<u>Dry</u>	<u>As Recd.</u>	<u>Dry</u>	<u>As Recd.</u>	<u>Dry</u>
Moisture.....	1.7	- -	2.0	- -	1.9	- -
Ash.....		9.4		9.7		9.6
Volatile Matter		12.9		13.2		13.0
Fixed Carbon...		<u>77.7</u>		<u>77.1</u>		<u>77.4</u>
		100.0		100.0		100.0
B.t.u.	13,700	13,930	13,680	13,950	13,675	13,940
Sulphur.....		2.2		2.2		2.2

Dry Mineral-Matter-Free Basis

Volatile Matter	12.9
Fixed Carbon	<u>87.1</u>
	100.0
B.t.u.	15,633

From the analysis on a dry mineral-matter-free basis, it will be noted that Sunshine Anthracite coal has a fixed carbon content of 87.1% or 1.1% more than necessary to cause it to fall within the semi-anthracite classification.

Reference has been made to Bulletin No. 5 of the Engineering Experiment Station of the University of Arkansas.

In the annual Report of the State Inspector of coal mines, State of Arkansas for the year 1924, is shown an analysis of coal from Spadra, Arkansas, made by the U. S. Geological Survey Laboratory No. 3,368 as follows:

(See Page Four)

That bids have been made and coal shipped, the specifications complied with, and the coal accepted and used as anthracite coal.

Exhibit C is submitted as additional proof of the same situation existing in another United States Army Post approximately 900 miles distant from the Post specified in Exhibit B.

Exhibit D is a price list published by a large coal company offering coal from an adjacent mine and classifying it as Arkansas Anthracite. We should like to call your attention to the fact that this circular is dated June 1929.

Exhibit E is a folder sent to the retail trade in Kansas City, Missouri, by the Wiedenmann-Simpson Coal Company offering our Sunshine coal under its regular established trade classification as anthracite.

Exhibit F is a price list published by one of the largest operating and selling companies in the Kansas City territory in which Sunshine is classified as an anthracite coal.

Exhibit G is a reprint from an advertisement of the Binkley Coal Company in which they classify Sunshine as an anthracite coal.

Exhibit H is a price list published in 1936 by the Western Sales Agents of one of the large Pennsylvania anthracite producers, and you will notice they list both Lehigh Valley Anthracite and Arkansas Anthracite.

Exhibit I is a descriptive folder published by the Binkley Coal Company describing their Briquets as a blended anthracite because they are made from 70% Sunshine Anthracite slack and 30% Oklahoma semi-bituminous slack. In this same folder they again list Sunshine as anthracite coal. We might further add that Standard Briquets were sold by the former owners of the plant for some twenty years as "blended anthracite briquets".

Exhibit J is another price list published by the Farmers Cooperative Association, Minneapolis, Minnesota, in which they state, "Arkansas Anthracite coal compares favorably with Pennsylvania Anthracite."

Exhibit K is another price list from another large company describing Arkansas Anthracite coal.

Exhibit L is Department of Commerce Bureau of Census, for use in morning papers June 23, 1937, Census of Business, 1935, in cooperation with the Bureau of Mines. These figures include mines producing 2,750,179 tons of lignite in the Dakotas, Texas, and Montana and mines producing 423,090 tons of anthracite and semianthracite in Arkansas, Colorado, Virginia, and New Mexico, which are grouped for statistical convenience with the bituminous coal industry. Separate statistics for the production of lignite, anthracite, and semianthracite are given in the reports of the Bureau of Mines.

We quote from Page 42 of the Keystone Coal Buyers Catalog and Mine Directory for the year 1932:

"Mining Districts of Arkansas - Spadra. Seam mined is the Hartshorne, known locally as the Spadra, and producing a semi-anthracite coal used for railroad, steam, domestic, and metallurgical purposes. Coal from this district is known to the trade as 'Arkansas anthracite'."

"In the Spadra district, the coal is harder and lower in volatile matter, giving rise to the name 'Arkansas anthracite', though in reality it is of the semianthracite rank. The larger sizes are used entirely for domestic purposes. The coal burns like Pennsylvania anthracite and just as satisfactorily, but it is not so hard and makes a little more slack and fine coal in transportation and handling. It is smokeless, burns with little flame, and maintains a fire for a long time with a strong steady heat. The slack is used as a reducing material in the retorts of the zinc smelters."

Page 170 of the Keystone Coal Buyers Manual for 1936 quotes:

"—Report of U.S. Coal Commission (Part IV), p. 2049 - The Arkansas Anthracite field embraces semi-anthracite operations in Pope County and in the Spadra District in Johnson County."

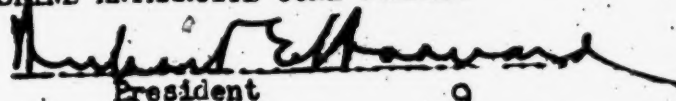
We have conclusively shown that Sunshine coal has been sold and generally recognized as anthracite coal for many, many years. According to the most rigid specifications available, the classification could not possibly be lower than semi-anthracite.

There is no remote possibility that the coal will be sold below cost of production. Neither is there any question as to our paying the established wage scale.

Sunshine coal does not fall within the jurisdiction of the Bituminous Coal Act of 1937. We, therefore, ask that a certificate of exemption be issued.

SUNSHINE ANTHRACITE COAL COMPANY

BY


President

Deed sworn to by Hubert E Howard
names omitted in printing.
(all in italics)

[fols. 11-18] Before National Bituminous Coal Commission

PETITION OF DIAMOND ANTHRACITE COAL COMPANY FOR EXEMPTION FROM THE PROVISIONS OF THE NATIONAL BITUMINOUS COAL ACT.

[Omitted in printing]

[fols. 19-25] Before National Bituminous Coal Commission

PETITION OF D. A. MCKINNEY COAL COMPANY, A CORPORATION, FOR EXEMPTION FROM THE PROVISIONS OF THE NATIONAL BITUMINOUS COAL ACT.

[Omitted in printing]

[fol. 26] United States Department of the Interior
National Bituminous Coal Commission
Washington, D. C.

ORDER No. 53

An Order Providing for a Public Hearing for the Purpose of Receiving Evidence to Enable the Commission to Determine Whether or not Certain Coals in the State of Arkansas are Subject to the Provisions of the Bituminous Coal Act of 1937, and for the Further Purpose of Hearing Applications for Exemption as Provided for by Order No. 28.

Whereas the Act of Congress entitled "An Act to regulate interstate commerce in bituminous coal, and for other purposes" (Public, No. 48, 75th Cong., 1st sess.), known as the Bituminous Coal Act of 1937, provides (Section 17 (b)) that "The term 'bituminous coal' includes all bituminous, semibituminous, and subbituminous coal and shall exclude lignite, which is defined as a lignitic coal having calorific value in British thermal units of less than seven thousand six hundred per pound and having a natural moisture content in place in mine of 30 per centum or more."; and

Whereas the Commission deems it necessary to conduct a public hearing in the State of Arkansas for the purpose of receiving evidence to enable the Commission to determine

whether or not certain coals in the State of Arkansas are subject to the provisions of the Bituminous Coal Act of 1937 and, further, to hear and determine at the same time all Arkansas applications for exemption filed pursuant to Order No. 28.

Now, Therefore, in order to determine whether the coals in said state or any part thereof does not come within the definition of "bituminous coal" as set forth in Section 17 (b) of the Act; and in order to hear applications filed pursuant to Order No. 28 of the Commission, the Commission hereby orders and directs:

1. That a public hearing shall be held at the Hotel Gholman in the City of Fort Smith, Arkansas, on the 4th day of October, 1937, commencing at the hour of 10 o'clock A. M. for the purpose of receiving evidence to enable the Commission to determine whether or not any part of the coals produced in the State of Arkansas does not come within the purview of Section 17 (b) of the Act.

[fol. 27-32] 2. That the public hearing so provided for by this order, at the time and place designated, include the hearing of the application for exemption filed by the Sunshine Anthracite Coal Company, Clarksville, Arkansas, pursuant to the Commission's Order No. 28, and, in addition, any other applications for exemption filed from the State of Arkansas pursuant to Order No. 28.

3. That any producer of coal, whether bituminous, semi-bituminous, subbituminous, anthracite or lignite, or the Consumers' Counsel, or code members, and all other interested parties may appear at said hearing and submit evidence.

4. Notice of said hearing shall be given under direction of the Secretary of the Commission by mailing a copy of this order to the Consumers' Counsel, to the Commission of Internal Revenue, to the Secretaries of the respective District Boards, and by publication of a notice upon two consecutive days in a newspaper of general circulation in the State of Arkansas. The notice published in said newspaper shall contain the date and place of the hearing and a concise statement of the purpose thereof.

By order of the Commission.

Dated this 24th day of September, 1937.

Eugene J. Earley, Acting Secretary. (Seal)

(There have been omitted in printing affidavits reciting that a true and correct copy of Order No. 53 was sent to the Southwestern American, Fort Smith, Arkansas, for publication; was printed in the Federal Register; was served by mail upon the district boards, consumers' counsel, government agencies, all interested persons of record on the Commission's mailing list, and upon the Sunshine Anthracite Coal Company.)

[Fols. 33-48] United States Department of the Interior

National Bituminous Coal Commission

Washington, D. C.

In the Matter of a Public Hearing for the Purpose of Receiving Evidence to Enable the Commission to Determine Whether or not Certain Coals in the State of Arkansas are Subject to the Provisions of the Bituminous Coal Act of 1937, and for the Further Purpose of Hearing Application for Exemption as Provided for by Order No. 28

ORDER OF ASSIGNMENT

Pursuant to authority contained in the Bituminous Coal Act of 1937 and in general resolution of the Commission, the above entitled matter is hereby assigned and referred to Examiner Carman A. Newcomb, who shall conduct a hearing and submit findings of fact and the recommendation of an appropriate order in the premises; a hearing in said matter is directed to be held at the hearing room of the Commission in the Hotel Goldman, Fort Smith, Arkansas on the 4th day of October 1937, commencing at the hour of 9 a. m.

By order of the Commission.

Dated this 30th day of September 1937.

(Signed) C. F. Hosford, Jr., Chairman.



Home Of The Co-op Coal Association

USE CO-OP COAL

AVAIL YOURSELF OF—

1. LOWER COSTS
2. HIGHER QUALITY
3. BETTER PROTECTION

COAL CONSUMERS

Who Buy Cooperatively Are Assured
of a Square Deal

No Short Weight

No Substitutions

No Long Wait



COAL ASSOCIATION

739 Johnson St., N. E. Granville 4394
(Johnson near Broadway)

EXHIBIT

No 10

You become a member of this Association when you buy its coal. As a member you have a right to complete satisfaction or your money back.

Price List Effective November 5, 1935

(Subject to Change Without Notice)

"King" Co-op Arkansas Anthracite

This coal compares favorably with Pennsylvania Anthracite; it is smokeless, sootless and hot.

	Ton	½ Ton
Egg	\$13.45	\$7.45
Stove	13.70	7.55

Pennsylvania Anthracite

Egg or Nut	15.95	8.70
Stove	16.20	8.80
Pea	14.70	8.05

"Webb" Co-op Smokeless Coal (Arkansas)

Everybody likes this coal because it is a trouble-proof, all-around coal, producing real heat with a minimum of smoke and soot.

Lump and Egg	13.10	7.25
Stove	12.25	6.85

"Mitchell" Co-op Coal (Oklahoma)

Equal to the best West Virginia Smokeless Coal.

Egg	12.00	6.70
-----	-------	------

Carries as much heat per ton as Pocahontas, holds fire longer and burns clean.

"Reichdale" Co-op Pocahontas Coal (West Virginia)

Egg	13.70	7.55
Stove	13.40	7.40
Pea, 1½ x ½ inch	11.65	6.55
Dom. Mine Run	11.00	

Carry—60c per ton, or fraction thereof.

"Kagawa" West Virginia Splint	Ton	½ Ton
Lump and Egg	11.20	6.30
Stove	10.80	6.10

"Konsum" Co-op East Kentucky, Millers Creek

Egg	11.30	6.35
Stove	11.05	6.25

"C. W. S. Co-op (Illinois)

An exceptionally good Illinois; all smaller sizes are put through a modern washing process which removes impurities and lowers ash.

3x6 Lump	9.50	5.50
3x2 Stove	9.50	5.30
1½x2 Nut	9.00	5.20

Many Twin City Consumers tell us this is the best fuel for the money that they have ever used.

Koppers Coke, Twin City

Stove or Nut	12.95	7.20
Pea	12.20	6.80

Granite City Coke (Call in for Prices)

Carbon No Ash Coke	
Screened	\$15.50
Unscreened	14.50

Slab Wood Mixed	6.25	
Birch Cordwood, 12 and 24 in. lgths.	8.50	5.00
Well Seasoned Oak, 16 in. lengths	6.75	4.00
Slab Kindling, lg. load, 12 in. lgths., (dry)	7.00	Load
Slab Wood Kindling, 150 pounds with coal order	1.00	

Carry and Throw in—\$1.25 ton; Throw in—75c.

Price List Effective November 5, 1935

(Subject to Change Without Notice)

"King" Co-op Arkansas Anthracite

This coal compares favorably with Pennsylvania Anthracite; it is smokeless, sootless and hot.

	Ton	1/2 Ton
Egg	\$13.45	\$7.45
Stove	13.70	7.55

Pennsylvania Anthracite

Egg or Nut	15.95	8.70
Stove	16.20	8.80
Pea	14.70	8.05

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Everybody likes this coal because it is a trouble-proof, all-around coal, producing real heat with a minimum of smoke and soot.

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Stove	12.25	6.85

"Mitchell" Co-op Coal (Oklahoma)

Equal to the best West Virginia Smokeless Coal.

Egg	12.00	6.70
-----------	-------	------

Carries as much heat per ton as Pocahontas, holds fire longer and burns clean.

"Rochdale" Co-op Pocahontas Coal (West Virginia)

Egg	13.70	7.55
Stove	13.40	7.40
Pea, 1 1/4 x 3/8 inch	11.65	6.55
Dom. Mine Run	11.00	

Carry—60c per ton, or fraction thereof.

	Ton	1/2 Ton
"Kagawa" West Virginia Splint Lump and Egg	11.20	6.30
Stove	10.80	6.10

"Konsum" Co-op East Kentucky, Millers Creek

Egg	11.30	6.35
Stove	11.05	6.25

"C. W. S. Co-op (Illinois)

An exceptionally good Illinois; all smaller sizes are put through a modern washing process which removes impurities and lowers ash.

3x6 Lump	9.50	5.50
3x2 Stove	9.50	5.30
1 1/4 x 2 Nut	9.00	5.20

Many Twin City Consumers tell us this is the best fuel for the money that they have ever used.

Koppers Coke, Twin City

Stove or Nut	12.95	7.20
Pea	12.20	6.80

Granite City Coke (Call in for Prices)

Carbon No Ash Coke Screened	\$15.50
Unscreened	14.50

Slab Wood Mixed	6.25	
Birch Cordwood, 12 and 24 in. lgths.	8.50	5.00
Well Seasoned Oak, 16 in. lengths	6.75	4.00
Slab Kindling, lg. load, 12 in. lgths., (dry)	7.00	Load
Slab Wood Kindling, 150 pounds with coal order	1.00	

Carry and Throw in—\$1.25 ton; Throw in—75c.

Read what some consumers say about our Arkansas and Oklahoma Coals:

"We have a seven room house heated by a hot water plant. We have tried many kinds of coal, but none has given us more satisfactory results than your 'King Co-op Arkansas Anthracite'."

A. KARLSSON, 511 Queen Ave. N.

"I have tried briquettes, coke, Penn Anthracite and various other coals in my small boiler, but I find your 'King' Co-op generates more abundant heat and holds fire longer than anything else I have tried."

A. WIPPER, 1710 Park Ave.

"A 'Webb' consumer says: 'We have a six-room house with a large furnace, and we have found that your smokeless coal from Arkansas has given us a comfortable house with a minimum amount of attention.'"

F. L. REYNOLDS, 3234 East 24th St.

"I had always used Pocahontas and Eastern coals until I heard of the satisfaction your 'Webb' coal was giving to Co-op members. Upon trying a ton of 'Webb' I, too, found it very satisfactory. I have filled up my furnace and left it for 30 hours and still had a glowing fire upon returning to the house."

BYRON OLSON, St. Paul, Minn.

"I have fired various furnaces with many different kinds of coal, but this 'Webb' coal surely is the best coal I have used yet."

CARLOS STAGEBURG, Minneapolis, Minn.

Save money by using Arkansas and Oklahoma Coals. Our mine connections assure more uniform grades and volume on these coals, making larger savings possible.

AMERICAN SOCIETY FOR TESTING MATERIALS

260 S. BROAD ST., PHILADELPHIA, PA.

TENTATIVE SPECIFICATIONS
FOR
CLASSIFICATION OF COALS BY RANK

A.S.T.M. Designation: D 388 - 36 T

This is a **Tentative Standard** and under the Regulations of the Society is subject to annual revision. Suggestions for revision should be addressed to the Headquarters of the Society, 260 S. Broad St., Philadelphia, Pa.

ISSUED, 1934; REVISED, 1935, 1936.

Scope

1. These specifications cover the classification of coals by rank, that is, according to their degree of metamorphism, or progressive alteration, in the natural series from lignite to anthracite.

Basis of Classification

2. The basic scheme of classification is according to fixed carbon and calorific value (expressed in B.t.u.) calculated to the mineral-matter-free basis. The higher-rank coals are classified according to fixed carbon on the dry basis; and the lower-rank coals according to B.t.u. on the moist basis. Agglomerating and slacking indices are used to differentiate between certain adjacent groups.

Basis of Classification

2. The basic scheme of classification is according to fixed carbon and calorific value (expressed in B.t.u.) calculated to the mineral-matter-free basis. The higher-rank coals are classified according to fixed carbon on the dry basis; and the lower-rank coals according to B.t.u. on the moist basis. Agglomerating and slacking indices are used to differentiate between certain adjacent groups.

CLASSIFICATION BY RANK

Classification by Rank

3. (a) *Fixed Carbon and B.t.u.*—Coals shall be classified by rank in accordance with Table I. Coals having calorific values of 14,000 B.t.u. or more on the moist, mineral-matter-free basis, and coals having fixed carbon of 69 per cent or more on the dry, mineral-matter-free basis, shall be classified according to fixed carbon on the dry, mineral-matter-free basis; coals having calorific values less than 14,000 B.t.u. on the moist, mineral-matter-free basis shall be classified according to B.t.u. on the moist, mineral-matter-free basis, provided the fixed carbon on the dry, mineral-matter-free basis is less than 69 per cent.

(b) *Weathering Index.*—Coals showing average weathering indices of less than 5 per cent shall be considered non-weathering, coals showing average weathering indices of 5 per cent or more shall be considered weathering from the standpoint of classification.

¹ Under the standardization procedure of the Society, these specifications are under the jurisdiction of the Sectional Committee on Classification of Coals functioning under the procedure of the American Standards Association with the American Society for Testing Materials as sponsor.

SPECIFICATIONS FOR CLASSIFICATION OF COALS BY RANK

(c) *Agglomerating Index*.—Coals which in the volatile matter determination produce either an agglomerate button that will support a 500-g. weight without pulverizing, or a button showing swelling or cell structure, shall be considered agglomerating from the standpoint of classification.

TABLE I.—CLASSIFICATION OF COALS BY RANK.

Legend: F.C. = Fixed Carbon.

V.M. = Volatile Matter.

B.t.u. = British thermal units.

Class	Group	Limits of Fixed Carbon or B.t.u. Mineral-Matter-Free Basis	Requisite Physical Properties
I. Anthracitic.....	1. Meta-anthracite.....	Dry F.C., 98 per cent or more (Dry V.M., 2 per cent or less)	Non-agglomerating*
	2. Anthracite.....	Dry F.C., 92 per cent or more and less than 98 per cent (Dry V.M., 8 per cent or less and more than 2 per cent)	
	3. Semlanthracite.....	Dry F.C., 86 per cent or more and less than 92 per cent (Dry V.M., 14 per cent or less and more than 8 per cent)	
II. Bituminous*	1. Low volatile bituminous coal....	Dry F.C., 78 per cent or more and less than 86 per cent (Dry V.M., 22 per cent or less and more than 14 per cent)	Either agglomerating or non-weathering*
	2. Medium volatile bituminous coal	Dry F.C., 69 per cent or more and less than 78 per cent (Dry V.M., 31 per cent or less and more than 22 per cent)	
	3. High volatile A bituminous coal	Dry F.C., less than 69 per cent (Dry V.M., more than 31 per cent); and moist ^b B.t.u., 14,000 ^d or more	
	4. High volatile B bituminous coal	Moist ^b B.t.u., 13,000 or more and less than 14,000 ^d	
	5. High volatile C bituminous coal	Moist B.t.u., 11,000 or more and less than 13,000 ^d	
III. Subbituminous	1. Subbituminous A coal.....	Moist B.t.u., 11,000 or more and less than 13,000 ^d	Both weathering and non-agglomerating
	2. Subbituminous B coal.....	Moist B.t.u., 9500 or more and less than 11,000 ^d	
	3. Subbituminous C coal.....	Moist B.t.u., 8300 or more and less than 9500 ^d	
IV. Lignite.....	1. Lignite.....	Moist B.t.u., less than 8300	Consolidated Unconsolidated
	2. Brown coal.....	Moist B.t.u., less than 8300	

II. Bituminous*	1. Low volatile bituminous coal....	Dry F.C., 78 per cent or more and less than 86 per cent (Dry V.M., 22 per cent or less and more than 14 per cent)	
	2. Medium volatile bituminous coal	Dry F.C., 69 per cent or more and less than 78 per cent (Dry V.M., 31 per cent or less and more than 22 per cent)	
	3. High volatile A bituminous coal	Dry F.C., less than 69 per cent (Dry V.M., more than 31 per cent); and moist ^b B.t.u., 14,000 ^d or more	
	4. High volatile B bituminous coal	Moist ^b B.t.u., 13,000 or more and less than 14,000 ^d	
	5. High volatile C bituminous coal	Moist B.t.u., 11,000 or more and less than 13,000 ^d	Either agglomerating or non-weathering ^e
III. Subbituminous	1. Subbituminous A coal.....	Moist B.t.u., 11,000 or more and less than 13,000 ^d	Both weathering and non-agglomerating
	2. Subbituminous B coal.....	Moist B.t.u., 9500 or more and less than 11,000 ^d	
	3. Subbituminous C coal.....	Moist B.t.u., 8300 or more and less than 9500 ^d	
IV. Lignite.....	1. Lignite.....	Moist B.t.u., less than 8300	Consolidated
	2. Brown coal.....	Moist B.t.u., less than 8300	Unconsolidated

* If agglomerating, classify in low-volatile group of the bituminous class.

^b Moist B.t.u. refers to coal containing its natural bed moisture but not including visible water on the surface of the coal.

^c It is recognized that there may be non-caking varieties in each group of the bituminous class.

^d Coals having 69 per cent or more fixed carbon on the dry, mineral-matter-free basis shall be classified according to fixed carbon, regardless of B.t.u.

^e There are three varieties of coal in the High-volatile C bituminous coal group, namely, Variety 1, agglomerating and non-weathering; Variety 2, agglomerating and weathering; Variety 3, non-agglomerating and non-weathering.

Symbols for Expressing Classification

4. (a) The position of a coal in the scale of rank may be expressed in condensed form as in the following example:

(62 — 146)

in which the parenthesis signifies that the contained numbers are on the mineral-matter-free basis. The first number represents fixed carbon on the dry basis, reported to the nearest whole per cent. The second number represents B.t.u. on the moist basis, expressed as hundreds of B.t.u. (to the nearest hundred); for example, 14,580 B.t.u. would be represented as 146.

(b) When agglomerating or weathering properties enter into the classification of a coal, they shall be expressed outside and immediately following the parenthesis by the following symbols:

ag. = agglomerating

na. = non-agglomerating

we. = weathering

nw. = non-weathering.

(c) Symbols describing the grade of coal shall be placed after the parenthesis, as shown in the following illustration:

(62-146) 132-A8-F24-S1.6

The numbers in parenthesis are on the mineral-matter-free basis, and give the position of the coal in the scale of rank as explained in Paragraph (a) of this section. The numbers and symbols following the parenthesis show the position of the coal according to classification by grade as shown in Section 2 of the Tentative Specifications for Classification of Coals by Grade (A.S.T.M. Designation: D 389 - 34 T) of the American Society for Testing Materials.¹ That is, 132-A8-F24-S1.6 indicates a calorific value of approximately 13,200 B.t.u., an ash content of 6.1 to 8.0 per cent, inclusive, an ash-softening temperature of 2400 to 2590 F., inclusive, and a sulfur content of 1.4 to 1.6 per cent, inclusive, all expressed on the basis of the coal as sampled.

SAMPLING

the numbers in parenthesis are on the mineral-matter-free basis, and give the position of the coal in the scale of rank as explained in Paragraph (a) of this section. The numbers and symbols following the parenthesis show the position of the coal according to classification by grade as shown in Section 2 of the Tentative Specifications for Classification of Coals by Grade (A.S.T.M. Designation: D 389 - 34 T) of the American Society for Testing Materials.¹ That is, 132-A8-F24-S1.6 indicates a calorific value of approximately 13,200 B.t.u., an ash content of 6.1 to 8.0 per cent, inclusive, an ash-softening temperature of 2400 to 2590 F., inclusive, and a sulfur content of 1.4 to 1.6 per cent, inclusive, all expressed on the basis of the coal as sampled.

SAMPLING

Bed Samples

5. (a) The classification of a coal bed, or part of a coal bed, in any locality shall be based on the average analysis and calorific value (and agglomerating and weathering index where required) of not less than three and preferably five or more face samples taken in different and uniformly distributed localities, either within the same mine or closely adjacent mines representing a continuous and compact area not greater than approximately four square miles in regions of geological uniformity. In regions where conditions indicate that the coal probably varies rapidly in short distances the spacing of samples and grouping of analyses to provide average values shall not be such that coals of obviously different rank will be used in calculating average values.

(b) The samples shall be taken in accordance with the U. S. Bureau of Mines method² or its equivalent, and shall be placed in moisture-tight containers in the mine.

¹ *Proceedings*, Am. Soc. Testing Mats., Vol. 34, Part I, p. 841 (1934); also 1936 Book of A.S.T.M. Tentative Standards, p. 527.

² J. A. Holmes, "The Sampling of Coal in the Mine," U. S. Bureau of Mines *Technical Paper* No. 1 (1918).

4 SPECIFICATIONS FOR CLASSIFICATION OF COALS BY RANK

(c) Analyses of samples from outcrops or from weathered or oxidized coal shall not be used for classification by rank.

(d) In case the coal is likely to be classified on the "moist" basis, that is, containing the natural bed-moisture, the samples shall be taken at freshly exposed faces, which are free from visible surface moisture if possible. Samples of low-rank coals which appear dry at the time of collection frequently give off moisture which condenses on the inner surface of the sample containers, before they are opened for analysis. In the case of coals which were free from visible surface moisture when sampled, but which show moisture on the inner surface of the containers when opened, both the container and the coal shall be weighed before and after air-drying and the total loss in weight shall be reported as air-drying loss.

(e) If it is impossible to sample the coal without including visible surface moisture, and the coal is likely to be classified on the "moist" basis, the sampler shall include the following statement in the description: "Sample contains surface moisture." Samples so marked shall not be used for classification on a moist basis unless brought to a standard condition of moisture equilibrium at 30 C. in a vacuum desiccator containing a saturated solution of potassium sulfate (97 per cent humidity) as suggested by Stansfield and Gilbert.¹ Analyses of such wet samples which have been treated in this manner shall be designated as "wet samples equilibrated at 30 C. and 97 per cent humidity."

(e) If it is impossible to sample the coal without including visible surface moisture, and the coal is likely to be classified on the "moist" basis, the sampler shall include the following statement in the description: "Sample contains surface moisture." Samples so marked shall not be used for classification on a moist basis unless brought to a standard condition of moisture equilibrium at 30 C. in a vacuum desiccator containing a saturated solution of potassium sulfate (97 per cent humidity) as suggested by Stansfield and Gilbert.¹ Analyses of such wet samples which have been treated in this manner shall be designated as "wet samples equilibrated at 30 C. and 97 per cent humidity."

Tipple or Shipment Samples

6. (a) The classification of "run of mine" coal and prepared sizes of coal shall be based on representative samples taken in accordance with the Standard Method of Sampling Coal (A.S.T.M. Designation: D 21) of the American Society for Testing Materials.²

(b) In case the coal is likely to be classified on the "moist" basis, the samples shall be taken at the tipple or preparation plant and protected against loss of moisture as specified in Sections 8 and 9 of the Standard Method D 21.² Samples which appear dry at the time of collection shall be handled in accordance with Section 5 (d) above to ensure correct determination of total air-drying loss. Samples which have visible surface moisture on the coal when sampled, and which are likely to be classified on the "moist" basis, shall be marked by the sampler, equilibrated, and the analyses designated in accordance with Section 5 (e) above.

¹ Edgar Stansfield and K. C. Gilbert, "Moisture Determination for Coal Classification," *Transactions, Am. Inst. Mining and Metallurgical Engrs., Coal Division*, p. 125 (1932).

² 1936 Book of A.S.T.M. Standards, Part II, p. 382.

METHODS OF ANALYSIS AND TESTS**Laboratory Sampling and Analysis**

7. The coal shall be prepared and analyzed in accordance with the Standard Methods of Laboratory Sampling and Analysis of Coal and Coke (A.S.T.M. Designation: D 271) of the American Society for Testing Materials.¹

Weathering or Slacking Index

8. Pending the adoption of a method by the American Society for Testing Materials, the weathering or slacking characteristics of coals shall be determined by the U. S. Bureau of Mines method² modified with respect to the selection of a standard humidity. Briefly, the test consists of air-drying 500 to 1000 g. of approximately 1 to 1½ in. lumps at a temperature of 30 to 35 C. and a humidity of 30 to 35 per cent for a period of 24 hr. and then immersing the lumps in water for 1 hr.; the water then being drained off, and the sample again air-dried for 24 hr. The amount of disintegration is determined by sieving on an 8-in. wire-mesh sieve with 0.263-in. square openings, and weighing the quantity of coal passing (undersize) and that retained on (oversize) the sieve. The percentage of coal passing the sieve (undersize), after deducting a blank sieving test, is the weathering or slacking index of the coal.

Agglomerating Index

9. Pending the adoption of a method by the American Society for Testing Materials the coke-button grading test³ afforded by the examination of the residue in the platinum crucible incident to the volatile matter determination, shall be used.

to 35 per cent for a period of 24 hr. and then immersing the lumps in water for 1 hr.; the water then being drained off, and the sample again air-dried for 24 hr. The amount of disintegration is determined by sieving on an 8-in. wire-mesh sieve with 0.263-in. square openings, and weighing the quantity of coal passing (undersize) and that retained on (oversize) the sieve. The percentage of coal passing the sieve (undersize), after deducting a blank sieving test, is the weathering or slacking index of the coal.

Agglomerating Index

9. Pending the adoption of a method by the American Society for Testing Materials the coke-button grading test³ afforded by the examination of the residue in the platinum crucible incident to the volatile matter determination, shall be used.

CALCULATION TO MINERAL-MATTER-FREE BASIS

Calculation of Fixed Carbon and B.t.u.

10. (a) For classification of coal according to rank, fixed carbon and B.t.u. shall be calculated to the mineral-matter-free basis in accordance with either the Parr formulas⁴ (1), (2) and (3) or the approximation formulas (4), (5) and (6) given below. In case of litigation the appropriate Parr formula shall be used.

¹ 1936 Book of A.S.T.M. Standards, Part II, p. 387.

² A. C. Fieldner, W. A. Selvig and W. H. Frederic, "Accelerated Laboratory Test for Determination of Slacking Characteristics of Coal," U. S. Bureau of Mines *Report of Investigations No. 3055* (1930).

³ R. E. Gilmore, G. P. Connell and J. H. H. Nicolls, "Agglomerating and Agglutinating Tests for Classifying Weakly Caking Coals," *Transactions, Am. Inst. Mining and Metallurgical Engrs., Coal Division*, Vol. 108, p. 255 (1934).

⁴ S. W. Parr, "The Classification of Coal," *Bulletin No. 180*, Engineering Experiment Station, University of Illinois (1928).

SPECIFICATIONS FOR CLASSIFICATION OF COALS BY RANK

Calculation from "moist" basis:

Parr Formulas:

$$\text{Dry, Mm-free F.C.} = \frac{\text{F.C.} - 0.15\text{S}}{100 - (\text{M} + 1.08\text{A} + 0.55\text{S})} \times 100 \dots\dots\dots (1)$$

$$\text{Dry, Mm-free V.M.} = 100 - \text{Dry, Mm-free F.C.} \dots\dots\dots (2)$$

$$\text{Moist, Mm-free B.t.u.} = \frac{\text{B.t.u.} - 50\text{S}}{100 - (1.08\text{A} + 0.55\text{S})} \times 100 \dots\dots\dots (3)$$

NOTE.—The above formula for fixed carbon is derived from the Parr formula for volatile matter.

Approximation Formulas:

$$\text{Dry, Mm-free F.C.} = \frac{\text{F.C.}}{100 - (\text{M} + 1.1\text{A} + 0.1\text{S})} \times 100 \dots\dots\dots (4)$$

$$\text{Dry, Mm-free V.M.} = 100 - \text{Dry, Mm-free F.C.} \dots\dots\dots (5)$$

$$\text{Moist, Mm-free B.t.u.} = \frac{\text{B.t.u.}}{100 - (1.1\text{A} + 0.1\text{S})} \times 100 \dots\dots\dots (6)$$

where:

- Mm = mineral matter;
- B.t.u. = British thermal units;
- F.C. = percentage of fixed carbon;
- V.M. = percentage of volatile matter;
- M = percentage of moisture;
- A = percentage of ash;
- S = percentage of sulfur;

Moist refers to coal containing its natural bed moisture, but not including visible water on the surface of the coal. See Section 5 (d) and (e) and Section 6 (b) above.

Approximation Formulas:

$$\text{Dry, Mm-free F.C.} = \frac{\text{F.C.}}{100 - (\text{M} + 1.1\text{A} + 0.1\text{S})} \times 100 \dots\dots\dots (4)$$

$$\text{Dry, Mm-free V.M.} = 100 - \text{Dry, Mm-free F.C.} \dots\dots\dots (5)$$

$$\text{Moist, Mm-free B.t.u.} = \frac{\text{B.t.u.}}{100 - (1.1\text{A} + 0.1\text{S})} \times 100 \dots\dots\dots (6)$$

where:

Mm = mineral matter;

B.t.u. = British thermal units;

F.C. = percentage of fixed carbon;

V.M. = percentage of volatile matter;

M = percentage of moisture;

A = percentage of ash;

S = percentage of sulfur;

Moist refers to coal containing its natural bed moisture, but not including visible water on the surface of the coal. See Section 5 (d) and (e) and Section 6 (b) above.

Modification for Coals High in Carbonate

(b) In case of controversy, samples containing more than 1.0 per cent of carbon dioxide occurring as carbonates shall be either (1) crushed to pass through an 840-micron (No. 20) sieve and floated on a heavy liquid of such specific gravity as to reduce the carbon dioxide occurring as carbonate to 1.0 per cent or less on a dry basis, provided, however, that the recovery of float coal shall not be less than 75 per cent; or (2) shall be analyzed for mineral matter according to the Parr method¹ for coals with high calcium carbonate content. In case of litigation, method (1) shall be used.

¹ S. W. Parr, "Chemical Study of Illinois Coal," Illinois Coal Mining Investigations, State Geological Survey, Urbana, Ill., *Bulletin No. 3*, p. 35 (1916).

PUBLISHED ANALYSES SUITABLE FOR COAL CLASSIFICATION

Only such published analyses as have been made in accordance with the standard methods of the American Society for Testing Materials shall be used in the classification of coal; and if classification is on the basis of moist B.t.u., then only those samples which have been taken and transported to the laboratory in such a manner as to preserve the true moisture content of the coal shall be used. In general, the principal sources of published analyses of samples suitable for coal classification are the publications of the U. S. Bureau of Mines, the U. S. Geological Survey, and the Canadian Department of Mines. Suitable analyses are published also by some of the State Surveys and some of the Provinces of Canada. However, it must be kept in mind that many of the bed sample analyses of the governmental organizations are from prospects in which the coal may have been altered by exposure. Such samples shall not be used for classification. Analyses published prior to 1904 are unlikely to represent the true moisture content of coal, and even after this date, analyses from sources other than governmental laboratories are not likely to be representative with respect to moisture.

In view of the importance of the fixed carbon determination in coal classification, special attention is called to the 1913 revision in this method by the American Chemical Society.¹ The new revision was substantially the same as that introduced by the U. S. Bureau of Mines² a few years earlier, as a result of finding large discrepancies between results of the Pittsburgh, Pa., and Washington, D. C., laboratories. A considerable number of analyses were made before it was discovered that the natural-gas burners at the Pittsburgh laboratory gave high results for fixed carbon.³ For this reason, the fixed carbon results of the U. S. Geological Survey or U. S. Bureau of Mines analyses designated by Laboratory Nos. 5147 to 9120, inclusive, shall not be used for the classification of coal.

All analyses made by any laboratory prior to 1913 should be rejected unless there is positive evidence that the methods of analysis were essentially those adopted by the American Society for Testing Materials in 1913.

¹ Preliminary Report of the Committee on Coal Analysis of the American Society for Testing Materials and the American Chemical Society, *Journal of Industrial and Engineering Chemistry*, Vol. 5, p. 517 (1913); see also Report of Subcommittee IV on Volatile Matter, *Proceedings, Am. Soc. Testing Mats.*, Vol. XIV, Part I, p. 424 (1914).

² A. C. Fieldner, "Notes on the Sampling and Analysis of Coal," U. S. Bureau of Mines *Technical Paper No. 76*, p. 16 (1914).

³ N. W. Lord, J. A. Holmes, F. M. Stanton, A. C. Fieldner and S. Sanford, "Analyses of Coals in the United States," U. S. Bureau of Mines *Bulletin No. 22*, Part I, p. 28 (1913).

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EXHIBIT No. 14

Classification of Certain Arkansas Coals Based Upon Analyses Given in U. S.
Bureau of Mines T. P. No. 416—"Analyses of Arkansas Coals, pp. 9-15,
Inclusive

County	Laboratory Number	Dry, Mm-free ¹		Rank ²
		V. M.	F. C.	
Franklin.....	W 69641	14.9	85.1	Low volatile bituminous coal
	W 69643	14.2	85.8	"
	W 69644	14.0	86.0	Semianthracite
	3371	14.6	85.4	Low volatile bituminous coal
	1040	16.6	83.4	"
	1042	16.8	83.2	"
	18749	15.8	84.2	"
Johnson.....	3369	10.0	90.0	Semianthracite
	1130	15.1	84.9	Low volatile bituminous coal
	1131	15.3	84.7	"
	3370	11.4	88.6	Semianthracite
	2587	11.5	83.5	"
	2588	10.9	89.1	"
	3368	11.3	88.7	"
	3407	10.6	89.4	"
Logan.....	3174	15.0	85.0	Low volatile bituminous coal
	18753	17.8	82.2	"
Pope.....	3177	10.5	89.5	Semianthracite
	3176	9.6	90.4	"
	18755	12.0	88.0	"
Scott.....	3503	34.8	65.2	Not determinable
	3505	26.2	73.8	Med. volatile bituminous coal
Sebastian.....	3218	16.4	83.6	Low volatile bituminous coal
	2599	16.6	83.4	"
	2600	16.6	83.4	"
	1049	19.2	80.8	"
	1053	16.9	83.1	"
	W 69378	17.0	83.0	"
	W 69379	17.8	82.2	"
	W 69397	17.8	82.2	"
	3148	17.2	82.8	"
	1068	19.1	80.9	"
	1066	18.4	81.6	"
	3155	15.7	84.3	"
	3156	16.9	83.1	"
	3158	15.9	84.1	"
	A 3301	18.7	81.3	"
	3372	14.6	85.4	"
	3175	16.8	83.2	"
	3173	15.1	84.9	"

¹The figures given for F. C. and V. M. are obtained by using ASTM formula on page 6 of the ASTM Tentative Specifications classification of coals by Rank.

²Note that the ASTM classification calls for an additional test in the case of semianthracite coals. If the coal is agglomerating it should be classified as low volatile. Agglomerating tests for these coals are not available at this time.

[fol. 143-151]

EXHIBIT No. 14—Continued

Classification of Certain Arkansas Coals Based Upon Analyses Given in U. S. Bureau of Mines T. P. No. 416—"Analyses of Arkansas Coals, pp. 9-15, Inclusive—Continued.

County	Laboratory Number	Dry, Mm—free ¹		Rank. ²
		V. M.	F. C.	
Sebastian.....	18062	17.5	82.5	Low volatile bituminous coal
	18063	20.4	79.6	
	A 3302	17.9	82.1	
	A 3304	19.0	81.0	
	3157	17.4	82.6	
	3497	18.0	82.0	
	29838	21.2	78.8	
	81812	17.9	82.1	
	3500	19.8	80.2	
	W 69615	19.5	80.5	
	W 69620	18.6	81.4	
	W 69632	18.4	81.6	
	W 69633	18.1	81.9	
	1045	18.7	81.3	
	1046	18.5	81.5	
	2585	17.8	82.2	
	2586	17.9	82.1	
	27617	19.3	80.7	
	W 69329	18.8	81.2	
	W 69330	20.6	79.4	
	W 69331	18.2	81.8	
	W 69332	18.1	81.9	
	W 69334	20.7	79.3	
	3149	15.5	84.5	
	1030	18.6	81.4	
	1031	17.7	82.3	
	3153	15.1	84.9	
	18267	18.1	81.9	
	1115	18.2	81.8	
	1118	18.0	82.0	
	3151	16.5	83.5	
	A 3303	18.3	81.7	
	2594	16.8	83.2	
	2593	17.8	82.2	
	3152	15.8	84.2	
	1052	21.0	79.0	
	1054	18.1	81.9	
	3150	16.5	83.5	
Washington.....	26260	33.4	66.6	15370 B T U
	26259	32.3	67.7	15459 B T U

Calculations by L. N. Klein, M. Otero, C. Harris, Market Statistics Unit
Nat. Bit. Coal Comm., Oct. 2, 1937

¹ The figures given for F. C. and V. M. are obtained by using ASTM formula on page 6 of the ASTM Tentative Specifications classification of coals by Rank.

² Note that the ASTM classification calls for an additional test in the case of semianthracite coals. If the coal is agglomerating it should be classified as low volatile. Agglomerating tests for these coals are not available at this time.

: 152] H. Denman, Chairman. Geo. Reeves, Vice-
 irman. Earl Cobb, Sec-Treas.

Bituminous Coal Producers Board for District No. 14
 Rooms 213-14-15 Merchants National Bank Building
 P. O. Box 352. Phone 4000
 Fort Smith, Arkansas

October 14, 1937

Oct. 22, '37. 771

F. W. McCullough, Sec's.,
 tional Bituminous Coal Commission,
 estment Bldg., 15th & K Sts.,
 shington, D. C.

R SIR:

We are enclosing herewith duplicate copies covering the
 ysis of three different coal samples taken from different
 s of the mine of the Sunshine Anthracite Coal Company,
 ksville, Arkansas.

lease deliver these analyses to the Examiner who pre-
 d at the public hearing held at the Goldman Hotel,
 t Smith, Arkansas, on the 4th day of October, 1937, in
 rmining whether or not any part of the coal produced
 he State of Arkansas does not come under the purview
 ection 17 (b) of the Act.

These analyses are exact copies from the original as
 ished by the Kansas City Testing Laboratory, Inc.,
 as City, Missouri, on date of October 13, 1937.

Yours very truly, Bituminous Coal Prod. Board for
 District #14. (S.) H. Denman, by OTB. H. Den-
 man, Chairman.

D:mm.

Kansas City Testing Laboratory, (Inc.)
700 Baltimore Avenue
Kansas City, Missouri
Telephone Main 1327
Oct. 22, '37—771

Report of Analyses of Coal

For: Bituminous Coal Producers Board for District #14, Ft. Smith, Ark.
Date: October 13, 1937

Analyses

Laboratory Number.....	192,068			
Description.....	coal #1			
Proximate Analysis.....	as received	dry basis	dry ash free	basis
Moisture (105° C).....	0.82%	0.00%	0.00%	
Volatile Combustible.....	12.39%	12.49%	13.61%	
Fixed Carbon.....	78.61%	79.27%	86.39%	
Ash.....	8.18%	8.24%	0.00%	
	100.00%	100.00%	100.00%	100.00%
Total Combustible.....	91.00%	91.76%	100.00%	
Sulphur (S).....	1.80%	1.82%	1.98%	
Heating Value: (Bomb)				
British Thermal Units per				
pound of coal.....	14,000	14,110	15,377	
Water evap. by 1 lb. coal				
from and at 212° F-lbs.				
Special Tests and Remarks:				

Respectfully Submitted,

Kansas City Testing Laboratory
By

Kansas City Testing Laboratory, (Inc.)
700 Baltimore Avenue
Kansas City, Missouri
Telephone Main 1327
Oct. 22, '37—771

Report of Analyses of Coal

For: Bituminous Coal Producers Board for District #14, Ft. Smith, Arkansas
Date: October 13, 1937

Analyses

Laboratory Number.....	192,069			
Description.....	Coal #2			
Proximate Analysis.....	as received	dry basis	dry ash free	basis
Moisture (105° C).....	0.52%	0.00%	0.00%	
Volatile Combustible.....	10.56%	10.61%	11.96%	
Fixed Carbon.....	77.67%	78.08%	88.04%	
Ash.....	11.25%	11.31%	0.00%	
	100.00%	100.00%	100.00%	100.00%
Total Combustible.....	88.23%	88.69%	100.00%	
Sulphur (S).....	2.44%	2.45%	2.76%	
Heating Value: (Bomb)				
British Thermal Units per				
pound of coal.....	13,470	13,540	15,268	
Water evap. by 1 lb. coal				
from and at 212° F-lbs.				
Special Tests and Remarks:				

Respectfully Submitted,

Kansas City Testing Laboratory
By

155-157]

Form 55

Kansas City Testing Laboratory, (Inc.)
 700 Baltimore Avenue
 Kansas City, Missouri
 Telephone Main 1327

Report of Analyses of Coal

For: Bituminous Coal Producers Board for District #14, Ft. Smith, Ark.
 Date: October 13, 1937

Analyses

Laboratory Number.....	192,070				
Description.....	Coal #3				
Proximate Analysis.....	As received	dry basis	dry ash free	basis	
Moisture (105° C).....	0.70%	0.00%	0.00%		
Volatile Combustible....	10.95%	11.02%	12.85%		
Fixed Carbon.....	74.26%	74.79%	87.15%		
Ash.....	14.09%	14.19%	0.00%		
	100.00%	100.00%	100.00%	100.00%	
Total Combustible.....	85.21%	85.81%	100.00%		
Sulfur (S).....	2.16%	2.18%	2.54%		
Heating Value: (Bomb)					
British Thermal Units per					
pound of coal.....	13,208	13,300	15,500		
Water evap. by 1 lb. coal					
from and at 212° F-lbs.					
Special Tests and Remarks:					

Respectfully Submitted,

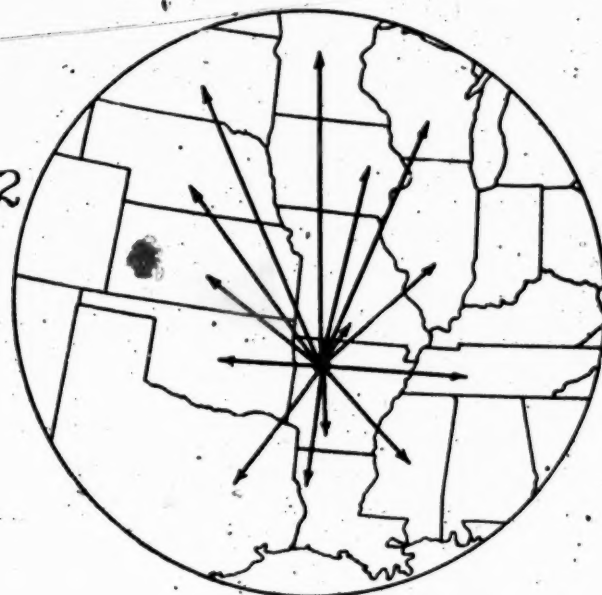
Kansas City Testing Laboratory

By

+NON-PENNSYLVANIA ANTHRACITES

"HARD COALS"

+ Outside of Pennsylvania Make Consistent Gains*



Where Arkansas Anthracite Goes

By O. E. KIESSLING

Associate Mineral Economist
U. S. Bureau of Mines

TO MOST PEOPLE, including those familiar with the coal trade, the term "anthracite" ordinarily denotes hard coal produced in the northeastern counties of Pennsylvania. Even some close observers are not generally aware that a considerable tonnage of coal of anthracitic and semianthracitic¹ qualities is produced outside of Pennsylvania—and that the volume of this production has been steadily increasing. Such coals are commercially produced in the Crested Butte field of Colorado, the Los Cerrillos of New Mexico, in the Spadra and Russellville districts of Arkansas, and in that portion of the Valley coal fields of Virginia lying in Montgomery and Pulaski counties.

From 363,324 net tons in 1913, the

production of hard coal outside of Pennsylvania practically doubled in the sixteen years through 1928. While output showed large gains beginning in 1916 and extending through the war period, further expansion occurred during the post-war years—an indication of the stable character of the new demand. This record of gradual growth over an extended period is especially significant when it is compared with other branches of the coal industry that have either lost volume or barely remained stationary since 1913.

To make comparisons easier, the figures of production are reduced to index numbers in Table II, taking the year 1913 as 100. It will be seen that the output of Pennsylvania anthracite was 18 per cent less in 1928 than in 1913, and that over

1914 and 1922—has production gone below the 1913 level; and in the latter of these two years the disturbing factor was labor difficulties.

The relative increase in the production of "other hard coal" is correlated with a large increase in the average value² per net ton received at the mine. For example, the \$4.19 per ton obtained in 1928 represents a gain of approximately 62 per cent over the \$2.58 for 1913. In general, values reached their highest levels from 1919 to 1923, with averages ranging from \$4.91 to \$5.75. The years 1924 to 1928, with average values from \$4.19 to \$4.70, marked a recession in prices, partly due to the nationwide depression in the coal market. The effect of the

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¹In this discussion the ranks given coals under the system of classification adopted by the United States Geological Survey a number of years ago are taken as guides. According to the method employed by the

UNITED STATES
DEPARTMENT OF THE INTERIOR
GEOLOGICAL SURVEY

OCT 22 37 772

COAL RESOURCES OF THE UNITED STATES

Table showing (A) the original tonnage of the various kinds of coal by States, (B) the amounts produced, (C) the estimated losses in mining and marketing, and (D) the estimated reserves of available coal at the end of 1929, all in net tons (2,000 pounds.)

By Marius R. Campbell.

STATE		ANTHRACITE OF VARIOUS KINDS	SEMITBITUMINOUS COAL	BITUMINOUS COAL	SUBBITUMINOUS COAL	LIGNITE
ALABAMA	A			67,570,000.000		
	B			524,298,463		
	C			156,989,540		
	D			<u>66,888,712.000</u>		
ARIZONA	A			10,000,000	1,141,000,000	
	B			9,207		
	C			2,762		
	D			<u>9,988.000</u>	<u>1,141,000.000</u>	
ARKANSAS	A	230,000,000	1,226,000,000	170,000,000		90,000,000
	B	2,796,000	59,264,821			
	C	839,000	17,779,400			
	D	<u>226,365.000</u>	<u>1,148,956.000</u>	<u>170,000.000</u>		<u>90,000.000</u>
CALIFORNIA	A			27,000,000	16,000,000	
	B			2,153,264		
	C			646,000		
	D			<u>24,201.000</u>	<u>16,000.000</u>	
COLORADO	A	100,000,000		213,071,000.000	104,175,000.000	
	B	5,030,000		263,494,962	61,090,588	
	C	1,509,000		79,048,488	18,327,176	
	D	<u>93,461.000</u>		<u>212,728,457.000</u>	<u>104,095,582.000</u>	

ALABAMA

A
B
C
D

67,570,000.000

524,298,463

156,989,540

66,888,712.000

ARIZONA

A
B
C
D

10,000,000

1,141,000,000

9,207

2,762

9,988,0001,141,000,000

ARKANSAS

A
B
C
D

230,000,000

1,226,000,000

170,000,000

90,000,000

2,796,000

59,264,821

839,000

17,779,400

226,365,0001,148,956,000170,000,00090,000,000

CALIFORNIA

A
B
C
D

27,000,000

16,000,000

2,153,264

646,000

24,201,00016,000,000

COLORADO

A
B
C
D

100,000,000

213,071,000,000

104,175,000,000

5,030,000

263,494,962

61,090,588

1,509,000

79,048,488

18,327,176

93,461,000212,728,457,000104,095,582,000

GEORGIA

A
B
C
D

933,000,000

10,686,856

3,206,056

919,107,000

IDAHO

A
B
C
D

600,000,000

100,000,000

895,000

268,500

596,836,500100,000,000

159-160

W. D. LANGTRY, PRESIDENT

A. L. LANGTRY, VICE-PRESIDENT

J. F. KOHOUT, CHEMICAL DIRECTOR

COMMERCIAL TESTING & ENGINEERING CO.

Offices and Laboratories

CHICAGO, ILLINOIS
CHARLESTON, W. VA.
TOLEDO, OHIO
DETROIT, MICH.



SINCE 1909
GENERAL OFFICES

BELL BUILDING

307 NORTH MICHIGAN AVENUE

PHONE RANDOLPH 8434

CHICAGO

Oct. 14, 1937

Coal Analysis

PROXIMATE ANALYSIS
FUSION TEMPERATURE OF ASH
ULTIMATE ANALYSIS
BY-PRODUCT TESTS
WATER GAS TESTS
PRODUCER GAS TESTS

Boiler Water Analysis

Mechanical Engineering

BOILER TESTS
COMBUSTION PROBLEMS
SURVEY AND DESIGN
OF POWER PLANTS

Name **Binkley Coal Company**

Address **Chicago, Ill.**

Kind of Coal --

Dealer --

Sample Taken by **Yourselves**

Date Sampled **10-7-37**

Sample Identification

**Sunshine Anthracite Coal Co.
Clarksville, Ark.**

**Sample No. 1
No. 1 Entry**

Sunshine Mine

CERTIFIED ANALYSIS REPORT

LABORATORY NO. **122452**

Dealer:

Sunshine Mine

Sample Taken by Yourselves

Date Sampled 10-7-37

CERTIFIED ANALYSIS REPORT

LABORATORY NO. 122452

PROXIMATE ANALYSIS

Non agglomerating
by test specified
in United States
Bureau of Mines
Information Circular
No. 6955 dated
March, 1937.

No semblance
of button.

	Per Cent As Rec'd In Lab.	Per Cent Dry Basis	DRY MINERAL MATTER FREE
Moisture	2.97		
Ash	7.77	8.01	
Volatile	12.96	13.36	13.24
Fixed Carbon	76.30	78.63	86.76
	100.00	100.00	100.00
B.t.u.	13699	14118	
Sulphur	1.84	1.90	

FUSION TEMPERATURE OF ASH ~~XXX~~

(Softening Temperature)
U. S. B. of M. and A. S. T. M. Definition



FORM 127 BM 8-37

Respectfully submitted,
W. D. Langtry
W. D. LANGTRY
President 161

W. D. LANGTRY, PRESIDENT

A. L. LANGTRY, VICE-PRESIDENT

J. F. KOHOUT, CHEMICAL DIRECTOR

COMMERCIAL TESTING & ENGINEERING CO.

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BELL BUILDING
307 NORTH MICHIGAN AVENUE

PHONE RANDOLPH 8434

OCT 22 37 772 CHICAGO Oct. 13, 1937

Coal Analysis

PROXIMATE ANALYSIS
FUSION-TEMPERATURE OF ASH
ULTIMATE ANALYSIS
BY-PRODUCT TESTS
WATER GAS TESTS
PRODUCER GAS TESTS

Boiler Water Analysis

Mechanical Engineering

BOILER TESTS
COMBUSTION PROBLEMS
SURVEY AND DESIGN
OF POWER PLANTS

Name **Sinkley Coal Company**

Address **Chicago, Illinois**

Kind of Coal --

Dealer --

Sample Taken by **Yourselves**

Date Sampled **10-7-37**

Sample Identification

**Sunshine Anthracite Coal Co.
Clarksville, Ark.**

**Sample No. 2
No. 2 Entry**

Sunshine Mine

CERTIFIED ANALYSIS REPORT

LABORATORY NO. **122455**

PROXIMATE ANALYSIS

Kind of Coal --

Sample No.2
No.2 Entry

Dealer --

Sunshine Mine

Sample Taken by Yourself

Date Sampled 10-7-37

CERTIFIED ANALYSIS REPORT

LABORATORY NO. 122455

PROXIMATE ANALYSIS

Non agglomerating
by test specified
in United States

Bureau of Mines
Information Circular

No.6933 dated
March, 1937.

No semblance
of button.

Moisture
Ash
Volatile
Fixed Carbon

Per Cent
As Rec'd
In Lab.

Per Cent
Dry Basis

DRY MINERAL
MATTER FREE

3.02
9.87
12.37
74.74
100.00

10.18
12.76
77.06
100.00

12.45
87.55
100.00

B.t.u.
Sulphur

13311
2.52

13725
2.60

FUSION TEMPERATURE OF ASH XXX

(Softening Temperature)
U.S.B. of M. and A.S.T.M. Definition



FORM 127 SM-37

Respectfully submitted,

W. D. LANGTRY
President

162

W. D. LANGTRY, PRESIDENT

A. L. LANGTRY, VICE-PRESIDENT

J. F. KOHOUT, CHEMICAL DIRECTOR

COMMERCIAL TESTING & ENGINEERING CO.

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307 NORTH MICHIGAN AVENUE

PHONE RANDOLPH 8434

OCT 22 '37 772 CHICAGO Oct. 14, 1937

Coal Analysis

PROXIMATE ANALYSIS
FUSION TEMPERATURE OF ASH
ULTIMATE ANALYSIS
BY-PRODUCT TESTS
WATER GAS TESTS
PRODUCER GAS TESTS

Boiler Water Analysis

Mechanical Engineering
BOILER TESTS
COMBUSTION PROBLEMS
SURVEY AND DESIGN
OF POWER PLANTS

Name **Binkley Coal Company**

Address **Chicago, Illinois**

Kind of Coal **--**

Dealer **--**

Sample Taken by **Yourselves**

Date Sampled **10-7-37**

Sample Identification

**Sunshine Anthracite
Coal Company
Clarksville, Ark.**

**Sample #5
#3 Entry**

Sunshine Mine

CERTIFIED ANALYSIS REPORT

LABORATORY NO. 122456

PROXIMATE ANALYSIS

Kind of Coal --

Sample #5
#3 Entry

Dealer --

Sunshine Mine

Sample Taken by Yourselves

Date Sampled 10-7-37

CERTIFIED ANALYSIS REPORT

LABORATORY NO. 122456 /

PROXIMATE ANALYSIS

Non agglomerating
by test specified
in United States
Bureau of Mines
Information
Circular No. 6933
dated March, 1937.
No semblance
of button.

	Per Cent As Rec'd <u>In Lab.</u>	Per Cent <u>Dry Basis</u>	<u>DRY MINERAL MATTER FREE</u>
Moisture	2.38		
Ash	7.49	7.67	
Volatile	12.05	12.34	12.02
Fixed Carbon	78.08	79.99	87.90
	<u>100.00</u>	<u>100.00</u>	<u>100.00</u>
B.t.u.	13873	14211	
Sulphur-	2.06	2.11	

FUSION TEMPERATURE OF ASH ~~XXX~~

(Softening Temperature)
U. S. B. of M. and A. S. T. M. Definition



FORM 137 SM-8-37

Respectfully submitted,
W. D. Langtry
W. D. LANGTRY
President 163

W. D. LANGTRY, PRESIDENT

A. L. LANGTRY, VICE-PRESIDENT

J. F. KOHOUT, CHEMICAL DIRECTOR

COMMERCIAL TESTING & ENGINEERING CO.

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BELL BUILDING
307 NORTH MICHIGAN AVENUE

PHONE RANDOLPH 8434

CHICAGO Oct. 14, 1937

Coal Analysis

PROXIMATE ANALYSIS
FUSION TEMPERATURE OF ASH
ULTIMATE ANALYSIS
BY-PRODUCT TESTS
WATER GAS TESTS
PRODUCER GAS TESTS

Boiler Water Analysis

Mechanical Engineering

BOILER TESTS
COMBUSTION PROBLEMS
SURVEY AND DESIGN
OF POWER PLANTS

OCT 22 37 772

Name Binkley Coal Company

Address Chicago, Ill.

Kind of Coal #1 Nut 1-1/2 x 7/8"

Dealer --

Sample Taken by Yourself

Date Sampled 10-7-37

Sample Identification

Sunshine Anthracite Coal Co.
Clarksville, Ark.

Sample No. 4
Tipple Sample

Sunshine Mine

CERTIFIED ANALYSIS REPORT

LABORATORY NO. 122457

Kind of Coal #1 Nut 1-1/2 x 7/8"

Sample No. 4
Tipple Sample

Dealer --

Sunshine Mine

Sample Taken by Yourselves

Date Sampled 10-7-37

CERTIFIED ANALYSIS REPORT

LABORATORY NO. 122457

PROXIMATE ANALYSIS

Non agglomerating
by test specified
in United States
Bureau of Mines
Information Circular
No. 6933 dated
March, 1937.
No semblance
of Dutton.

	Per Cent As Rec'd <u>In Lab.</u>	Per Cent <u>Dry Basis</u>	<u>DRY MINERAL MATTER FREE</u>
Moisture	1.46		
Ash	6.91	7.01	
Volatile	12.74	12.93	12.72
Fixed Carbon	78.89	30.06	87.28
	100.00	100.00	100.00
B.t.u.	14167	14577	
Sulphur	1.81	1.84	

FUSION TEMPERATURE OF ASH ~~XXX~~

(Softening Temperature)
U. S. B. of M. and A. S. T. M. Definition

Respectfully submitted,
W. D. Langtry
W. D. LANGTRY
President 164



W. D. LANGTRY, PRESIDENT

A. L. LANGTRY, VICE-PRESIDENT

J. F. KOHOUT, CHEMICAL DIRECTOR

COMMERCIAL TESTING & ENGINEERING CO.

Offices and Laboratories

CHICAGO, ILLINOIS
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307 NORTH MICHIGAN AVENUE

PHONE RANDOLPH 8434

CHICAGO

3072237

Oct. 14, 1937

Coal Analysis

PROXIMATE ANALYSIS
FUSION TEMPERATURE OF ASH
ULTIMATE ANALYSIS
BY-PRODUCT TESTS
WATER GAS TESTS
PRODUCER GAS TESTS

Boiler Water Analysis

Mechanical Engineering
BOILER TESTS
COMBUSTION PROBLEMS
SURVEY AND DESIGN
OF POWER PLANTS

Name **Birkley Coal Company**

Address **Chicago, Illinois**

Kind of Coal **No. 4 Nut 2-1/2x1-1/2"**

Dealer **--**

Sample Taken by **Yourselves**

Date Sampled **10-7-37**

Sample Identification

Sunshine Anthracite Coal
Company
Clarksville, Ark.

Sample No. **5**
Tipple Sample

Sunshine Mine

CERTIFIED ANALYSIS REPORT

LABORATORY NO. **122458**

Kind of Coal No.4 Nut 2-1/2x1-1/2"

Sample No.5
Tipple Sample

Dealer --

Sunshine Mine

Sample Taken by Yourselfes

Date Sampled 20-7-37

CERTIFIED ANALYSIS REPORT

LABORATORY NO. 12245R

PROXIMATE ANALYSIS

on agglomerating
y test specified
n United States
ureau of Mines
nformation
ircular No.6933
ated March,1937
No semblance
f button.

	Per Cent As Rec'd In Lab.	Per Cent Dry Basis	DRY MINERAL MATTER FREE
Moisture	1.78		
Ash	7.24	7.17	
Volatile	11.97	12.19	
Fixed Carbon	79.21	80.64	11.99
	100.00	100.00	100.00
B.t.u.	14063	14318	
Sulphur	1.64	1.67	

FUSION TEMPERATURE OF ASH

(Softening Temperature)
U. S. B. of M. and A. S. T. M. Definition



FORM 137 SM-837

Respectfully submitted
W. D. Langtry
W. D. LANGTRY
President 165

W. D. LANGTRY, PRESIDENT

A. L. LANGTRY, VICE-PRESIDENT

J. F. KOHOUT, CHEMICAL DIRECTOR

OCT 22 1937 772
COMMERCIAL TESTING & ENGINEERING CO.

Offices and Laboratories

CHICAGO, ILLINOIS
CHARLESTON, W. VA.
TOLEDO, OHIO
DETROIT, MICH.



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GENERAL OFFICES

BELL BUILDING

307 NORTH MICHIGAN AVENUE

PHONE RANDOLPH 8434

CHICAGO Oct. 14, 1937

Coal Analysis

PROXIMATE ANALYSIS
FUSION TEMPERATURE OF ASH
ULTIMATE ANALYSIS
BY-PRODUCT TESTS
WATER GAS TESTS
PRODUCER GAS TESTS

Boiler Water Analysis

Mechanical Engineering
BOILER TESTS
COMBUSTION PROBLEMS
SURVEY AND DESIGN
OF POWER PLANTS

OCT 22 1937
Name Binkley Coal Company

Address Chicago, Illinois

Kind of Coal Grate coal 3x7"

Dealer --

Sample Taken by Yourself

Date Sampled 10-7-37

Sample Identification

**Sunshine Anthracite Coal
Company
Clarksville, Ark.**

Sample #6, Tipple Sample

Sunshine Mine

CERTIFIED ANALYSIS REPORT

LABORATORY NO. 122459

Kind of Coal **Grate coal 3x7"**

Sample #6, Tipple Sample

Dealer **--**

Sunshine Mine

Sample Taken by **Yourselves**

Date Sampled **10-7-37**

CERTIFIED ANALYSIS REPORT

LABORATORY NO. **122459**

PROXIMATE ANALYSIS

Non-agglomerating
by test specified
in United States
Bureau of Mines
Information
Circular No. 6933
dated March, 1937.
No semblance
of bottom.

	Per Cent As Rec'd In Lab.	Per Cent Dry Basis	DRY MINERAL MATTER FREE
Moisture	2.06		
Ash	6.94	7.09	
Volatile	12.83	13.10	13.00
Fixed Carbon	78.27	72.81	87.00
	100.00	100.00	100.00
B.t.u.	14046	14542	
Sulphur	1.58	1.61	

FUSION TEMPERATURE OF ASH

232

(Softening Temperature)
U. S. B. of M. and A. S. T. M. Definition



FORM 137 BM-8-37

Respectfully submitted,
W. D. Langtry
W. D. LANGTRY
President 166

VAN CLEVE LABORATORIES INC

CHEMISTS AND ASSAYERS

OFFICE AND LABORATORIES
322 FOURTH ST. SO.

MINNEAPOLIS MINN.

OCT 22 37 772

TELEPHONE ATLANTIC 1810

October 14, 1937

941
No. 28491

COAL SAMPLE No. 1,
Entry No. 1, 40 feet North of Air Shaft
SUNSHINE MINE, CLARKSVILLE, ARK.

ANALYZED FOR BINKLEY COAL Co.

As received Dry Mineral
Matter Free

Moisture	2.41	
Ash	8.62	
Volatile matter	12.48	12.64
Fixed carbon	76.49	87.36
Sulphur	1.72	

B.T.U. as received	13,600
dry	13,930

Agglomeration test
(USEM Circ. #6933)

No button formed.

VAN CLEVE LABORATORIES, INC.

By

W. O. Bell

President.

VAN CLEVE LABORATORIES INC

CHEMISTS AND ASSAYERS

OFFICE AND LABORATORIES
322 FOURTH ST. SO.

MINNEAPOLIS MINN.

OCT 22 37 772

TELEPHONE ATLANTIC 1010

October 14, 1937

No. 28942

COAL SAMPLE No. 2

Entry No. 2, 75 feet North of Air Shaft
SUNSHINE MINE, CLARKSVILLE, Ark.

ANALYZED FOR BINKLEY COAL CO.

As received Dry Mineral
Matter Free

Moisture	3.22	
Ash	10.36	
Volatile matter	12.39	12.49
Fixed carbon	74.03	87.51
Sulphur	2.62	

B.T.U. as received	13,190
dry	13,630

Agglomeration test
(USBM Circ. #6933)

No button formed

VAN CLEVE LABORATORIES, INC.

By *W. Bell*
President.

VAN CLEVE LABORATORIES INC

CHEMISTS AND ASSAYERS

OFFICE AND LABORATORIES
322 FOURTH ST. SO.

MINNEAPOLIS MINN.

OCT 22 37 772
TELEPHONE ATLANTIC 1810

October 14, 1937

No. 28943

COAL SAMPLE No. 3

Entry No. 3, 100 feet North of Air Shaft.
SUNSHINE MINE, CLARKSVILLE, ARK.

ANALYZED FOR BINKLEY COAL CO.

	As Received	Dry Mineral Matter Free
--	-------------	----------------------------

X Moisture	1.72	
X Ash	7.35	
X Volatile matter	12.59	12.56
X Fixed carbon	78.34	87.44
X Sulphur	1.99	

B.T.U. as received	13,910
dry	14,150

Agglomeration test
(USEM CIRC. # 6933)

No button formed

VAN CLEVE LABORATORIES, INC.

By *W. B. L.*
By President

VAN CLEVE LABORATORIES INC.

CHEMISTS AND ASSAYERS

OFFICE AND LABORATORIES
322 FOURTH ST. SO.

MINNEAPOLIS MINN.

TELEPHONE ATLANTIC 1810

October 14, 1937

No. 28944

COAL SAMPLE No. 4

Tipple Sample, #1 Nut, 1 1/2" x 7/8"
SUNSHINE MINE, CLARKSVILLE, Ark.

OCT 22 37 772

ANALYZED FOR BINKLEY COAL CO.

	As received	Dry Mineral Matter Free
--	-------------	----------------------------

X Moisture	1.20	
X Ash	7.34	
X Volatile matter	12.24	12.12
X Fixed carbon	79.22	87.88
X Sulphur	1.91	

B.T.U. as received	13,990
dry	14,160

Agglomeration test
(USEM Cir. #6933)

No button formed

VAN CLEVE LABORATORIES, INC.

By *W. Bell*
President.

VAN CLEVE LABORATORIES INC

CHEMISTS AND ASSAYERS

OFFICE AND LABORATORIES
322 FOURTH ST. SO.

MINNEAPOLIS MINN.

TELEPHONE ATLANTIC 1310

OCT 22 1937

October 14, 1937

No. 29845

COAL SAMPLE NO. 5

Tipple Sample, #4 Nut, 2 1/2" x 1 1/2"
SUNSHINE MINE, CLARKSVILLE, ARK.

ANALYZED FOR BINKLEY COAL CO.

	As received	Dry Mineral Matter Free
Moisture	0.96	
Ash	7.43	
Volatile matter	12.21	12.13
Fixed Carbon	79.40	87.87
Sulphur	1.73	
B.T.U. as received	14,000	
dry	14,130	

Agglomeration test
(USEM Circ. #6933)

No button formed

VAN CLEVE LABORATORIES, INC.

By *W. Bell*
President.

VAN CLEVE LABORATORIES INC. OCT 22 37 772

CHEMISTS AND ASSAYERS

OFFICE AND LABORATORIES
322 FOURTH ST. SO.

TELEPHONE ATLANTIC 1810

MINNEAPOLIS MINN.

October 14, 1937

No. 29846

COAL SAMPLE No. 6

Tipple Sample, Grate Size Coal, 5" x 7"
SUNSHINE MINE, CLARKSVILLE, ARK.

ANALYZED FOR BINKLEY COAL CO.


	As received	Dry Mineral Matter Free
✓ Moisture	1.65	
✓ Ash	7.35	
✓ Volatile matter	13.19	13.34
✓ Fixed carbon	77.81	86.66
✓ Sulphur	1.65	
B.T.U. as received	14,080	
dry	14,320	

Agglomeration test
(USEM Circ. #6933)

No button formed

VAN CLEVE LABORATORIES, INC.

By


President.

172-175

[fols. 176-204] United States Department of the Interior
National Bituminous Coal Commission
Washington

Docket No. 68-FD

Investigation to Determine Whether or Not Certain Coals
in the State of Arkansas Are Subject to the Provisions of
the Bituminous Coal Act of 1937, and for the Further
Purpose of Hearing Applications for Exemption as Pro-
vided for by Orders Nos. 28 and 53;

and

In the Matter of the Application of Sunshine Anthracite
Coal Company for Exemption Under Sub-Section (b) of
Section 17 of the Bituminous Coal Act of 1937, et al.

REPORT OF EXAMINER

(It is stipulated by the parties that the report of the trial
examiner, Carmian A. Newcomb, dated December 3, 1937,
omitted in printing, contains findings of fact which, in so far
as material, are the same in substance as findings thereafter
made by the Commission. The examiner recommended
that the Commission enter an order declaring all coals
produced in the state of Arkansas to be bituminous coal
and subject to the provisions of the Bituminous Coal Act of
1937, and enter a further order denying the application for
exemption filed by the Sunshine Anthracite Coal Company.
The attorney for Sunshine Anthracite Coal Company ac-
knowledged receipt of this report under date of January
28, 1938.)

[fols. 205-216] United States Department of the Interior

National Bituminous Coal Commission

Washington

Docket No. 68-FD

Investigation to Determine Whether or Not Certain Coals in the State of Arkansas Are Subject to the Provisions of the Bituminous Coal Act of 1937, and for the Further Purpose of Hearing Applications for Exemption as Provided for by Orders Nos. 28 and 53;

and

In the Matter of the Application of Sunshine Anthracite Coal Company for Exemption Under Sub-Section (b) of Section 17 of the Bituminous Coal Act of 1937, et al, Including D. A. McKinney Coal Company, Clarksville, Arkansas and Diamond Anthracite Coal Company, Clarksville, Arkansas.

EXCEPTIONS TO REPORT OF EXAMINER AND BRIEF IN SUPPORT THEREOF, OF THE DIAMOND ANTHRACITE COAL COMPANY, CLARKSVILLE, ARKANSAS

[Omitted in printing]

[fols. 217-242].

February 14, 1938

United States Department of the Interior

National Bituminous Coal Commission

Washington

Docket No. 68-FD

Investigation to Determine Whether or Not Certain Coals in the State of Arkansas Are Subject to the Provisions of the Bituminous Coal Act of 1937, and for the Further Purpose of Hearing Applications for Exemption as Provided for by Orders Nos. 28 and 53;

and

In the Matter of the Application of Sunshine Anthracite Coal Company for Exemption Under Sub-Section (b) of Section 17 of the Bituminous Coal Act of 1937, et al, Including D. A. McKinney Coal Company, Clarksville, Arkansas, and Diamond Anthracite Coal Company, Clarksville, Arkansas.

EXCEPTIONS TO REPORT OF EXAMINER AND BRIEF IN SUPPORT THEREOF, OF THE D. A. MCKINNEY COAL COMPANY, CLARKSVILLE, ARKANSAS

[Omitted in printing]

[fol. 243] Before the National Bituminous Coal Commission

Docket No. 68-FD

In the Matter of Petition of Sunshine Anthracite Coal Company for Exemption

PETITIONER'S MOTION FOR DISMISSAL OF PETITION

Comes now the petitioner of the above entitled cause, and moves that the petition herein be dismissed, and asks leave that the papers be withdrawn from the files.

Dated at Washington, D. C. this 21st day of January, 1938.

Sunshine Anthracite Coal Company, by Henry Adamson, Its Attorney. Henry Adamson, 409-411 Star Building, Terre Haute, Ind.

[fols. 244-245] United States Department of the Interior

National Bituminous Coal Commission

Washington, D. C.

Docket No. 68-FD

In the Matter of Petition of Sunshine Anthracite Coal Company for Exemption

ORDER DENYING MOTION TO DISMISS PETITION

The petitioner above named having filed with the Commission on the 21st day of January, 1938, a motion to dismiss

petition and asking leave to withdraw papers from the files in the above entitled matter, and the Commission having duly considered such motion,

Now, Therefore, it is hereby ordered:

That the motion above referred to be and the same is hereby denied.

The Secretary of the Commission shall forthwith mail a copy of this Order to the petitioner.

By order of the Commission.

Dated this 3rd day of February, 1938.

F. Witcher McCullough, Secretary. (Seal.)

[fol. 246] United States Department of the Interior

National Bituminous Coal Commission

Washington, D. C.

Docket No. 68-FD

Investigation to Determine Whether or Not Certain Coals in the State of Arkansas Are Subject to the Provisions of the Bituminous Coal Act of 1937, and for the Further Purpose of Hearing Applications for Exemption as Provided for by Orders Nos. 28 and 53;

and

In the Matter of the Applications of Sunshine Anthracite Coal Company, Diamond Anthracite Coal Company and D. A. McKinney Coal Company for Exemption, Filed Pursuant to Orders Nos. 28 and 53 of the Commission

PROPOSED REPORT OF THE COMMISSION

The Commission promulgated its Order No. 28, on the 27th day of July, 1937, which order provided a method of procedure for the determination of the character of coals and for the issuance of certificates of exemption to producers of coals other than bituminous, semibituminous and subbituminous. The Sunshine Anthracite Coal Company, on August 31, 1937, filed its application for exemption pursuant thereto, alleging that the coals produced by it do not

come within the regulatory provisions of the Bituminous Coal Act of 1937, and praying for a certificate of exemption.

Thereafter, on September 24, 1937, the Commission entered its Order No. 53 providing for a public hearing for the purpose of receiving evidence to enable the Commission to determine whether or not certain coals in the State of Arkansas are subject to the provisions of the Bituminous Coal Act of 1937, and for the further purpose of hearing applications for exemption as provided for by Order No. 28. Said matter was assigned to Examiner Carmen A. Newcomb for hearing on October 4, 1937, at the Goldman Hotel, Ft. Smith, Arkansas. Due and proper notice having been given, said hearing was commenced at the time and place therein stated, and concluded at 3:55 P. M. on October 6, 1937:

At said hearing Diamond Anthracite Coal Company, a partnership, and lessee of Diamond Anthracite Coal Company, a corporation, and the D. A. McKinney Coal Company, a corporation, with offices in the City of Clarksville, Arkansas, intervened and were granted permission to file applications for certificates of exemption, entered their appearance therein, and stipulated that the evidence to be adduced at said hearing be made applicable to them.

Subsequently, on January 21, 1938, the Examiner filed his report, proposed findings of fact and recommendations with the Commission, which were duly served upon all interested parties.

[fol. 247] Thereupon the Sunshine Anthracite Coal Company filed its motion with the Commission to withdraw its application for exemption and all papers connected therewith; which motion, upon due consideration by the Commission, was denied. The applicants, Diamond Anthracite Coal Company and D. A. McKinney Coal Company, within the time prescribed by Rule XXIII of the Rules of Practice and Procedure of the Commission, filed exceptions to the report of the Examiner and briefs in support thereof.

The Commission being fully advised of the evidence adduced at said hearing, as the same is contained in the official transcripts of the testimony and documentary evidence, filed herein, and upon due consideration of the report of the Examiner and the exceptions filed thereto, makes the following:

Findings of Fact

There are two coal bearing areas within the State of Arkansas, only one of which is of present commercial im-

portance. No known production comes from the lignite bearing area in the eastern and southeastern part of the State. The coal bearing area, under consideration here, is in the west central part of the State and extends eastward from the Arkansas-Oklahoma State Line for a distance of about one hundred miles. The field varies in width from about fifty miles at the State Line to about twenty-five miles at its eastern extremity. This coal bearing area falls within the limits of the following counties which are listed from west to east: Washington, Crawford, Sebastian, and Scott; Madison, Franklin, and Logan, Johnson; Pope and Yell; and Conway. This area lies within the boundaries of District 14 as such district is defined in the Act, to-wit: "District 14. The following counties in Arkansas: All Counties in the State. The following counties in Oklahoma: Haskell, LeFlore, Sequoyah."

The seam from which the coals herein involved are mined, is known as the Hartshorne bed. It extends from the town of Hartshorne in the State of Oklahoma eastward a distance of approximately 150 miles to the town of Russelville in Pope County, Arkansas.

The coal bearing area, involved herein, is divided into mining districts—the mining district being a contiguous area in which a number of mines have been opened. These districts, with reference to the counties in Arkansas in which they are located, may be designated as follows:

Sebastian County: Districts—Huntington and Hartford, Bates, Excelsior-Hackett, Greenwood, and Jenny Lind Bonanza.

Scott County: Bates District.

Franklin County: Districts—Charleston, Philpott, and Denning-Coal Hill.

Logan County: Districts—Paris and Seranton.

Johnson County: Districts—Philpott, Denning-Coal Hill, and Spadra.

[fol. 248] Pope County: Districts—Russelville, including Ouita Basin and Shinn Basin.

The Spadra district is situated in Johnson County between the Denning-Coal Hill field on the west and Russelville District in Pope County, which includes the Ouita Basin and Shinn Basin on the east. The coals mined in each of these districts are from the Hartshorne seam.

The Sunshine Anthracite Coal Company, Diamond Anthracite Coal Company, a partnership and D. A. McKinney Coal Company, hereinafter referred to as the applicants, are engaged in the business of mining coal, operating mines in the Spadra District located in Johnson County within the State of Arkansas and in said District No. 14. These applicants sell and distribute coal in interstate commerce and in competition with coals which are in interstate commerce.

The coals produced by the applicants are mined in the Spadra field. This field was opened about 1894 and 1895 by one Abe Stillwell, who, in order to introduce his coal in the market, called it anthracite because it was low in volatile content. For the purpose of advertising and stimulating trade from that time on each producer and sales agent has called it "Arkansas Anthracite" or "Spadra Anthracite". Applicant, Sunshine Anthracite Coal Company, has purchased coals from other mines in the Spadra field for resale, and has advertised and sold such coal on the market as "Arkansas Anthracite" coal.

Producers of coal operating mines in Johnson County, in which the Spadra district is located, and in Pope County, contiguous with Johnson County, produce coal similar in physical appearance and chemical analysis to the coals produced by applicants, and such producers concede that their coals are subject to the regulatory provisions of the Bituminous Coal Act of 1937. Similar coals are also produced in various fields within the Hartshorne seam and other seams within the State of Arkansas, and are considered by their producers to be subject to the Bituminous Coal Act of 1937.

We find from the record that there are in existence at least 17 systems of classifying coal. According to several of these systems Arkansas coals must be classified as semi-bituminous; according to others as semi-anthracite. Among these is the system of classification of coals by rank, adopted by the American Society for Testing Materials in September, 1937, upon which the applicants rely heavily. This system of classification does not provide a category known as semi-bituminous coal, whereas the Bituminous Coal Act of 1937, approved prior to the classifications adopted by the A. S. T. M., provides specifically for a semi-bituminous classification and provides that "Bituminous" coal shall include "semibituminous."

Therefore, we find that certain analyses secured by the applicants purporting to show that their coals are semi-anthracite based on A. S. T. M. standards and submitted after the hearing was adjourned, if otherwise admissible as evidence, can not be considered as controlling the determination of the issues in this proceeding. There is no ultimate authority or official classification and the classification of any particular coal depends on the system used. Analysis alone is not always a basis for classifying coals.

[fol. 249] Heber Denman, Chairman of District Board No. 14, a graduate mining engineer who worked in the anthracite field in Pennsylvania in the Engineering department of a coal company and who since 1898 has operated coal mines in what is now the State of Arkansas, and who by training and experience we find qualified as an expert, classifies all coal produced in the State of Arkansas involved in this proceeding, and specifically in the Spadra district, in which the applicants are engaged in the business of mining coal, as semibituminous coal.

Other witnesses experienced in the mining and selling of coal produced in the area involved in this proceeding testified that the coal produced therein is different from anthracite coal in that it is softer than anthracite; that Arkansas coal gives off smoke, anthracite does not; that Arkansas coal is dirty, whereas anthracite is not; that different types of machinery are used to mine Arkansas coal from the types used to mine anthracite; that the wage rate paid to miners in Arkansas is based on the bituminous coal scale and not on the anthracite coal scale; that Arkansas coal competes with low volatile bituminous coals from the Pocahontas field in West Virginia and not with Pennsylvania anthracite; that Arkansas coal is more akin in appearance and structure, in hardness and friability, to the low volatile bituminous coals of West Virginia than to the anthracite coal of Pennsylvania; that during the N. R. A., Arkansas coals were held subject to regulation as part of the bituminous coal industry by the Code Authority, while Pennsylvania anthracite was not so regulated; and that the advertising of Arkansas coals in the City of St. Louis as Arkansas anthracite was condemned as an unfair trade practice by the Fair Trade Practice Association on the basis that Arkansas coal was not in fact anthracite upon a ruling obtained from the Bureau of Mines and the United States Geological Survey.

We therefore find upon the basis of expert testimony and testimony of witnesses who have had long experience in the mining and distribution of coal produced in the districts involved in this proceeding that all coal produced in such districts, and particularly in the Spadra district, in which the mines of the applicants are located, is semi-bituminous coal.

Conclusions

On the basis of the foregoing findings of fact, we conclude:

That the coals produced by the applicants, the Sunshine Anthracite Coal Company, Diamond Anthracite Coal Company, a partnership, and D. A. McKinney Coal Company, in the State of Arkansas, are bituminous coals within the meaning of Section 17 (b) of the Bituminous Coal Act of 1937, and are subject to the regulation thereof.

That all coal produced in Washington, Crawford, Sebastian, Scott, Madison, Franklin, Logan, Johnson, Pope, Yell and Conway Counties, in the State of Arkansas, is bituminous coal within the meaning of Section 17 (b) of the Bituminous Coal Act of 1937, and is subject to the regulation thereof.

[fols. 250-254] An appropriate order shall be entered, declaring that all coal produced in Washington, Crawford, Sebastian, Scott, Madison, Franklin, Logan, Johnson, Pope, Yell and Conway Counties, in the State of Arkansas, being within the boundaries of District 14, is subject to the Bituminous Coal Act of 1937, and denying the aforesaid applications filed by the Sunshine Anthracite Coal Company, the Diamond Anthracite Coal Company and the D. A. McKinney Coal Company.

[fols. 255-256]

United States

Department of the Interior

National Bituminous Coal Commission

Washington, D. C.

Docket No. 68-FD

Investigation to Determine Whether or Not Certain Coals in the State of Arkansas are Subject to the Provisions of the Bituminous Coal Act of 1937, and for the Further Purpose of Hearing Applications for Exemption as Provided for by Orders No. 28 and 53;

and

In the Matter of the Applications of Sunshine Anthracite Coal Company, Diamond Anthracite Coal Company and D. A. McKinney Coal Company for Certificates of Exemption, Filed Pursuant to Order No. 28

NOTICE AS TO FILING OF EXCEPTIONS.

Please take notice:

(1) That attached hereto is a true and correct copy of the proposed report of the Commission as filed in the Office of the Secretary of the Commission on April 28, 1938, in the above entitled matter;

(2) That this notice, together with a true and correct copy of the said proposed report of the Commission, is being served upon the Sunshine Anthracite Coal Company, Diamond Anthracite Coal Company, a partnership, and D. A. McKinney Coal Company as of this date;

(3) That any of said parties may file with the Commission, exceptions and briefs to the said proposed report within thirty (30) days of the service of said proposed report;

(4) That any of said parties may apply to the Commission for oral argument if exceptions are filed within the said thirty (30) day period; and

(5) That in the absence of the filing of exceptions within the period allowed, the said proposed report shall become

effective as the Commission's report at the expiration of the thirty day period.

By the Commission.

Dated this 7th day of May, 1938.

Edgar C. Faris, Jr., Acting Secretary: (Seal.)

(Affidavit showing service on petitioner has been omitted.)

[fol. 257]

United States

Department of the Interior

National Bituminous Coal Commission

Washington, D. C.

Docket No. 68-FD

In the Matter of the Application of Sunshine Anthracite Coal Company for Certificate of Exemption Filed Pursuant to Order No. 28

EXCEPTIONS OF SUNSHINE ANTHRACITE COAL COMPANY TO
PROPOSED REPORT OF THE COMMISSION

Comes now Sunshine Anthracite Coal Company and files herein its exceptions to the proposed report of the Commission, which said report was filed in the office of the Secretary of the Commission on April 28, 1938, a copy of which said report was received by said Sunshine Anthracite Coal Company on the 12th day of May, 1938, and said Sunshine Anthracite Coal Company excepts to the findings of fact and conclusions therein contained as follows, to wit:

(Sunshine Anthracite Coal Company is attaching hereto a copy of the findings of fact and conclusions, and in order to facilitate reference thereto has numbered the paragraphs to the end that the exceptions hereinafter stated may be more readily applied.)

1. The proposed findings of fact do not contain finding that Sunshine Anthracite Coal Company is a code member. Unless the Sunshine Anthracite Coal Company is a code member, then the National Bituminous Coal Commission is without jurisdiction of the subject matter, and any order entered would be null and void.

[fol. 258] 2. The record in the above matter conclusively shows that Sunshine Anthracite Coal Company is not a code member and has not accepted membership in the code provided for in the Bituminous Coal Act of 1937, and any order entered by the Commission, insofar as the Sunshine Anthracite Coal Company is concerned, would be null and void.

3. The proposed findings of fact set forth in paragraph 1 of the attached copy are not sustained by any substantial and proper evidence, and are irrelevant and improper as to the Sunshine Anthracite Coal Company.

4. The proposed findings of fact set forth in paragraph 2 of the attached copy are not sustained by any substantial and proper evidence, and are irrelevant and improper as to the Sunshine Anthracite Coal Company.

5. The proposed findings of fact set forth in paragraph 3 of the attached copy are not sustained by any substantial and proper evidence, and are irrelevant and improper as to the Sunshine Anthracite Coal Company.

6. The proposed findings of fact set forth in paragraph 4 of the attached copy are not sustained by any substantial and proper evidence, and are irrelevant and improper as to the Sunshine Anthracite Coal Company.

7. Sunshine Anthracite Coal Company excepts to that part of the proposed finding in paragraph 6, as follows:

"The coals produced by the applicants are mined in the Spadra field. This field was opened about 1894 and 1895 by one Abe Stillwell, who, in order to introduce his coal in the market, called it Anthracite because it was low in volatile content. For the purpose of advertising and stimulating trade from that time on each producer and sales agent has called it "Arkansas Anthracite" or "Spadra Anthracite," for the reason that said statement is not a finding of fact [fol. 259] and is not supported by any substantial or proper evidence in the record, and as to the Sunshine Anthracite Coal Company is immaterial and irrelevant.

8. Sunshine Anthracite Coal Company excepts to all of the proposed findings in paragraph 7 of the attached copy, for the reason that said proposed findings are not supported by any substantial or proper evidence, and as to the Sun-

shine Anthracite Coal Company are totally immaterial and irrelevant.

9. Sunshine Anthracite Coal Company excepts to all of paragraph 8 of said proposed findings of fact hereto attached, for the reason that the proposed findings are not findings of fact but merely evidentiary statements, and for the further reason that said proposed finding as to Sunshine Anthracite Coal Company is immaterial and irrelevant.

10. Sunshine Anthracite Coal Company excepts to all of paragraph 9 of the attached copy of the proposed findings of fact for the reason that said proposed findings are not supported by any substantial or proper evidence.

11. Sunshine Anthracite Coal Company excepts to all of paragraph 10 of the attached proposed findings of the Commission, for the reason that said proposed findings of fact are merely the statement of the evidence of one particular witness, and for the further reason that said proposed findings are not supported by substantial or proper evidence in the record, and for the further reason that as to the Sunshine Anthracite Coal Company said findings would be immaterial and irrelevant.

12. Sunshine Anthracite Coal Company excepts to the proposed finding No. 11 in the copy attached hereto, for the reason that said finding is not a finding of facts but a mere statement of evidentiary matters, and for the further reason [fol. 260] that said evidentiary matters are immaterial and irrelevant to the Sunshine Anthracite Coal Company.

13. Sunshine Anthracite Coal Company excepts to all of paragraph 12 in the attached proposed findings of the Commission for the reason that said proposed findings are not supported by any proper or substantial evidence.

And the said Sunshine Anthracite Coal Company excepts to the so-called conclusions set forth in said proposed report of the Commission for the following separate and several reasons, to wit:

1. There is no proper or substantial evidence in the record to sustain the conclusion that the coal produced by the Sunshine Anthracite Coal Company is bituminous coal within the meaning of section 17-b of the Bituminous Coal Act of 1937.

2. That the proposed conclusion is an attempt by the National Bituminous Coal Commission to enlarge the authority conferred on the Commission by the Bituminous Coal Act of 1937, and is beyond the power and authority conferred on the National Bituminous Coal Commission by said act.

3. That said proposed conclusion is an improper and invalid construction of the law as applied to the facts found in the evidence in the record in this cause.

4. That the said Sunshine Anthracite Coal Company has not been accorded a fair hearing conducive to the impartial and independent determination of the issue tendered by its informal application. The so-called hearing as disclosed by the record was in the nature of a general hearing for the entire state of Arkansas conducted without limitation as to evidence, its admissibility or relevancy, and the pro-[fol. 261-288] posed findings demonstrate that they are based on improper evidence of generalities, improper comparisons and improper so-called concessions and admissions by persons or corporations other than the Sunshine Anthracite Coal Company, and not relevant to the informal application for exemption of the Sunshine Anthracite Coal Company.

Respectfully submitted, Adamson, Blair & Adamson,
Attorneys for Sunshine Anthracite Coal Company.

Adamson, Blair & Adamson, 409-411 Star Building, Terre Haute, Indiana.

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[fol. 289] United States Department of the Interior National Bituminous Coal Commission Washington, D. C.

Docket No. 68-FD

In the Matter of the Application of Sunshine Anthracite Coal Company for Certificate of Exemption Filed Pursuant to Order No. 28

REQUEST FOR ORAL ARGUMENT

Comes now Sunshine Anthracite Coal Company, and requests that the adoption of the proposed report of the Commission and the exceptions of the Sunshine Anthracite Coal

Company thereto be set down for oral argument, and that the said Sunshine Anthracite Coal Company be given notice thereof.

Dated at Terre Haute, Indiana, this 19th day of May, 1938.

Adamson, Blair & Adamson, Attorneys for Sunshine Anthracite Coal Company.

[fol. 290] United States Department of the Interior National Bituminous Coal Commission Washington, D. C.

Docket No. 68-FD

In the Matter of the Application of the Sunshine Anthracite Coal Company for Certificate of Exemption Filed Pursuant to Order No. 28

NOTICE OF ORAL ARGUMENT ON EXCEPTIONS TO
PROPOSED REPORT OF THE COMMISSION.

The Sunshine Anthracite Coal Company, applicant above named, having filed with the Commission on the 21st day of May, 1938, exceptions to the proposed report of the Commission which was served upon the said applicant on the 12th day of May, 1938, and having requested that the adoption of the proposed report of the Commission and the exceptions thereto be set down for oral argument;

Now, Therefore, Notice Is Hereby Given that the adoption of the proposed report of the Commission and the exceptions of the Sunshine Anthracite Coal Company thereto are set down for oral argument before the Commission in the Hearing Room of the Commission in the Walker Building at Washington, D. C., on the 1st day of June, 1938, commencing at the hour of ten o'clock A. M.

The Secretary of the Commission is forthwith directed to telegraph notice of the time and place of the oral argument provided for herein to the Sunshine Anthracite Coal Company and mail copies of this notice to the Sunshine Anthracite Coal Company, the Consumers' Counsel, and to the Secretaries of the Bituminous Coal Producers' Boards, and shall cause a copy of the same to be published in the Federal Register.

By order of the Commission.

Dated this 23rd day of May, 1938.

F. Witheer McCullough, Secretary. (Seal.)

[fol. 291-298] (There have been omitted in printing the affidavit of proof of publication of the above notice in the Federal Register; a notice of continuance of oral argument, and affidavit of proof of publication thereof in the Federal Register; and a further notice setting the date for oral argument on June 24, 1938, together with affidavits of proof of service thereof and publication thereof in the Federal Register.)

[fol. 299] United States Department of the Interior

National Bituminous Coal Commission

Washington, D. C.

Docket No. 68-FD

Investigation to Determine Whether or Not Certain Coals in the State of Arkansas are Subject to the Provisions of the Bituminous Coal Act of 1937, and for the Further Purpose of Hearing Petitions for Exemption as Provided for by Orders Nos. 28 and 53;

and

In the Matter of the Petition of Sunshine Anthracite Coal Company for Exemption Under Sub-Section (b) of Section 17 of the Bituminous Coal Act of 1937, et al.

OPINION

The Sunshine Anthracite Coal Company, a corporation herein called the petitioner, filed its petition asking that its coal produced in the Spadra field in District 14, located in the State of Arkansas, be exempted from the provisions of the Bituminous Coal Act of 1937 (hereinafter called the Act) on the ground that such coal is not bituminous coal. A public hearing to enable the Commission to determine whether certain coals in Arkansas are subject to the Act, as well as a hearing upon the petition, was conducted by the National Bituminous Coal Commission pursuant to proper notice.

E. N. Thompson, Ralph Thompson and W. H. Hackney, partners in the Diamond Anthracite Coal Company, and the [fol. 300] D. A. McKinney Coal Company, a corporation,

producers of coal in the same field, filed intervening petitions seeking similar relief and by agreement submitted their petitions upon evidence introduced in behalf of the petitioner. They are herein called "intervenor".

It appears that all procedural rules have been complied with by the petitioner and intervenors. The examiner made findings of fact with which the Commission, after a review of the record, is in general accord and which are supplemented by the Commission's own findings of fact and report. The conclusions of the examiner and the Commission are substantially the same.

For the purposes of this opinion and the ruling of the Commission upon exceptions filed, the important facts found by the Commission may be summarized as follows:

1. All coals produced by the petitioner and intervenors in Arkansas are mined from what is known as the "Harts-horne Seam" which underlies District 14 in Arkansas and part of Oklahoma. The group of mines involved here is in the "Spadra" field which is wholly within District 14, as referred to in the Act, and is one of several producing fields therein. The claim that the coal in the Spadra field is "semi-anthracite" is advanced only by the petitioner and intervenors, while many other coal producers in the Spadra field with mines in close proximity to those of the applicant and intervenors, and who produce the same kind of coal, testified that coal produced by them is bituminous and that their coals enter the same markets with those of the petitioner and intervenors and is sold as bituminous coal. All coal from the Spadra field competes with bituminous coals from other fields in District 14, and is generally used for the same purposes.

[fol. 301] 2. The coal produced by petitioner and intervenors is generally similar to the high grade bituminous coals of other fields, such as the Pocahontas Smokeless coals of West Virginia. The structure is hard but not as hard as Pennsylvania anthracite coal, nor does it have the structure and appearance of anthracite. It is a low volatile coal with a high percentage of fixed carbon, but not as high as that of anthracite, and the sulphur content is high. It is mined in the same manner as bituminous coal is mined which differs materially from the methods of mining anthracite. Spadra coal, including that of petitioner and intervenors is mined under the Bituminous Wage Scale which is substan-

tially lower than the Anthracite Wage Scale. Spadra coal has the appearance of bituminous coal and its burning characteristics are similar thereto and unlike those of anthracite. Coals mined in adjoining fields have qualities comparable with the coals of the Spadra field, although they differ slightly in volatile matter and fixed carbon, but the difference is so slight as to be unnoticeable in the merchandising thereof. The coals of adjoining producers in the Spadra field enter the same consuming markets as the coals of the petitioner and intervenors in competition with one another without regard to differences in their qualities. All Spadra coals are competitive in northern markets with the Smokeless coals of West Virginia and other high-grade bituminous coals, but in no markets are they competitive with Pennsylvania anthracite.

3. This so-called "semi-anthracite" coal is said to have been named in an advertising scheme dating back many years which was devised and used to stimulate sales under the trade names of "Arkansas Anthracite" or "Spadra Anthracite". On one occasion it was prohibited from being [fol. 302] sold in the St. Louis market because it did not qualify as anthracite and these trade names were misleading to the public.

4. The petitioner and intervenors rely principally upon a purported analysis to prove their case. They make no claim that their coal is anthracite, but they claim it to be "semi-anthracite" and not bituminous. There is nothing in this record or in the Act to show any legal status for a coal ranked as "semi-anthracite". The record does not enlighten us as to what "semi-anthracite" is, or how it differs from bituminous or other coals. To sustain a claim for classification as "Semi-anthracite", petitioner relies upon a method for classifying coal claimed to be approved by the American Society for Testing Materials (hereinafter called the A. S. T. M.). No one from this society testified, but to show the standards set up by this society, Witness Plein offered Exhibit No. 12. There are no analyses in the record to show the intervenors' coals to be semi-anthracite even according to the A. S. T. M. standards.

5. There was much expert testimony offered to the effect that all coal in the Spadra field is bituminous coal. There is noticeable agreement among all the witnesses and it is

admitted by petitioner and intervenors that their coal is the same as that produced by their neighbors in the same field. The great weight of the expert testimony is to the effect that all Spadra coal is bituminous, is well established as such, and has been so established over a long period of years in the various markets into which it moves.

6. It is conceded that petitioner and intervenors are engaged in interstate commerce. Approximately 98% of their production is exported from Arkansas.

[fol. 303] The Commission issued its Proposed Report and served the same upon petitioner and intervenors who filed exceptions. The petitioner alone presented oral argument. The exceptions of petitioner and intervenors are similar and present no issues of fact not fully covered in the findings of fact in the report of the examiner or findings of the Commission.

The exceptions are directed, inter alia, to the alleged generality and insufficiency of the evidence and to the consideration of alleged incompetent testimony. These exceptions are without merit. The hearing was duly held according to notice and the rules of the Commission and the examiner stated the purpose, rules and the Orders of the Commission. The petitioner proceeded with its case; the intervenors intervened, participated in the hearing, and subsequently filed formal petitions. There was ample opportunity for all interested parties to present evidence and to examine witnesses, and there was no objection to the competency of any witness. The record discloses a full and impartial hearing.

Evidence of the nature and rank of coals from mines in the Spadra and adjoining fields including those in close proximity to petitioner's and intervenors' mines is admissible and entitled to consideration as circumstantial evidence tending to show the character of the coals in question here. The probative value of this evidence is strengthened by the testimony of many witnesses, including admissions by the witnesses and representatives of petitioner and intervenors, that all of these coals come from the same seam, that they are competitive, similar in structure and use, and that all should have the same classification and treatment.

Three points are given special emphasis by counsel for petitioner:

[fol. 304]. 1. Petitioner and intervenors having invoked the jurisdiction of the Commission, now claim that the Com-

mission has no right to determine its jurisdiction to construe the Act of 1937 by which it was created, or to determine the proper classification of applicant's and intervenors' coal and this question is thus first urged on exceptions.

Congress made a direct grant of power to this Commission in the Act which is general and not detailed therein. It is similar to powers granted to other governmental agencies such as the Interstate Commerce Commission, the National Labor Relations Board, the Federal Trade Commission and others, and relates, in this instance, to the coal industry as the work of the other agencies relates to the particular fields of activities designated by law. The power of administrative commissions to construe the laws under which they operate has been questioned on various occasions, but the courts have held uniformly that those commissions have a positive implied power to construe and determine their jurisdiction under the law that created them and under which they function; the Commission would be left helpless by Congress if it were not so, and such power is taken for granted, as it was by the Court in *Federal Trade Commission v. Beech Nut Packing Company* (1922), 257 U. S. 491, A. L. R. 882, L. c. 890, when it said:

"The Commission, in the first instance . . . has the determination of practices which come within the scope of the Act."

In *Meyers et al., v. Bethlehem Shipbuilding Corporation* (1938), 82 L. Ed. (Adv.) 399, the Supreme Court sustained the jurisdiction of the National Labor Relations Board under a similar attack saying:

[fol. 305] "It is true that the Board has jurisdiction only if the complaint concerns interstate or foreign commerce. *Unless the Board finds that it does*, the complaint must be dismissed."

To the same effect, see also *Newport News Shipbuilding Corporation v. Schauffler* (Sup. Ct., 1938), 82 L. Ed. (Adv.) 406; *National Silver Company v. Federal Trade Commission* (C. C. A. 2nd 1937), 88 Fed. 2 425; *Langdon v. Pa. R. Company* (D. C. Pa., 1912), 198 Fed. 486; *Washington, Va. & Md. Coach Company v. N. L. R. B.* (1937), 301 U. S. 142; *N. L. R. B. v. Jones & Laughlin Steel Corp.* (1937), 301 U. S. 1; *Vecchio et al. v. Bowers* (1935), 296 U. S. 280;

U. S. v. Appalachian Electric Power Company (D. C. W. Va. 1938), 23 Fed. Supp. 83; *Federal Trade Commission v. Claire Furnace Company*, (C. C. A., Dist. Col., 1923), 285 Fed. 936; *Anniston Mfg. Co. v. Davis*, (Sup. Ct., 1937) 301 U. S. 337. The National Bituminous Coal Commission has the power to construe the Act and to determine the issues presented here. Petitioner's contention that the provisions of the Act itself preclude us from assuming jurisdiction herein is without merit because from the express grant of power to regulate interstate commerce in bituminous coal, the authority to determine whether particular coals are bituminous is necessarily implied, and the exercise thereof is indispensable to the enforcement of the Act. That Congress can properly classify and rank coals for regulation and taxation is not without legal support. In *Watson v. State Controller*, 254 U. S. 122, the Court said:

"Any classification is permissible which has a reasonable relation to some permitted end of Governmental action. It is enough, for instance, if the classification is reasonably founded in the purpose and policy of taxation."

And see also *Heisler v. Thomas Colliery Company*, post.

After the hearing and the filing of the Examiner's Report with recommendations that the petitions for exemption be denied, the Sunshine Anthracite Coal Company filed [fol. 306] its motion for leave to withdraw its petition and all papers filed therewith. The motion was denied by the Commission.

The motion was properly denied. The jurisdiction of the Commission to determine the subject matter of the application does not depend upon the filing of such application. The principal hearing held pursuant to Order No. 53 of the Commission, in which the petitioner participated pursuant to Order No. 28 of the Commission, was sufficient, in itself, to receive evidence to enable the Commission to determine whether or not any coals in the State of Arkansas, including those of the petitioner, are subject to the provisions of the Bituminous Coal Act of 1937. Further, the interest of the public and other parties hereto require a determination of these questions in that if such withdrawal were permitted, the petitioner would be free to advertise and sell its coal as "Arkansas Anthracite" or "Spadra Anthracite" in competition with other bituminous coals sold under

the regulation of the Act in common consuming markets. The effect of excluding the coals of petitioner from regulation would be to demoralize the bituminous coal industry in Arkansas. To permit such withdrawal would be prejudicial to the case of the intervenors and to the adverse interests of the other parties, producers and the public. *Jones v. Securities Exchange Commission* (1936), 80 L. Ed. 1015; 298 U. S. 1; *Bronx Foundry v. Trust Company* (1936), 297 U. S. 230; 80 L. Ed. 657.

2. Petitioner cites the decision of the National Bituminous Coal Commission on April 13, 1936 under the Bituminous Coal Conservation Act of 1935 in the case of the Anthracite Coal and Briquetting Corporation, Docket No. 34, wherein that Commission held certain coals in the State of Virginia to be anthracite in character and, therefore, [fol. 307] not subject to the Act of 1935. There is no requirement that this Commission follow the action of the Commission under the Act of 1935 which was repealed at the time the present Act became law. But to dispose of the argument advanced by the petitioner in asking that we follow that alleged precedent, we will briefly refer to that case.

The record here shows no similarity between the coals of petitioner or intervenors in Arkansas and those of the Anthracite Coal and Briquetting Company in Virginia. The record in Docket 34 does not show many of the principal issues presented here, nor did there then appear to be such need to determine the proper methods of classification as is now required and as subsequently established by the Commission under the Act of 1935. The record in Docket 34 shows the coals of the Anthracite Coal and Briquetting Company were not competitive with any of the bituminous coals produced in the surrounding district.

The Order of the Commission in Docket 34 established no exclusive methods for classifying or ranking coals that can be regarded by the petitioner or Commission as controlling herein; nor did the Commission then follow exclusively the then standards of the American Society for Testing Materials, although they are mentioned in the findings of the Commissioner-Examiner. On the contrary, the testimony of expert witnesses in that case was to the effect that a proper ranking of coals involved the consideration of physical and chemical properties, geological structure, trade customs and use. There is evidence in the record

covering all these aspects of the coals produced by the Anthracite Coal and Briquetting Company and evidence of analysis therein was not confined to the then approved A. S. T. M. standards. The ruling of the Commission in the Vir- [fol. 308] ginia case of 1936 is a single, recent decision and clearly is not established as a reasonable, settled rule of administrative practice or construction of long duration so as to be considered as a precedent of executive construction or interpretation. 59 C. J. 5, #609-10, p. 1025 Seq.; 137 U. S. 542; 78 L. Ed. 452; 70 A. L. R. 1299. It is not a precedent and is not controlling upon the issues now presented.

3. Petitioner urges that certain standards of classification claimed to have been approved by the A. S. T. M. must be controlling here, and since their coals are alleged to be semi-anthracite according to those standards, it is exempt.

There is no competent proof in the record that the standards set out in Exhibit No. 12 were finally approved by the A. S. T. M. prior to the enactment of the Act on April 26, 1937.

With due regard to the learning of the committee which prepared Exhibit No. 12, and disregarding its potential value for other purposes, there is no evidence that it has been generally accepted by the industry as the exclusive basis for classification.

No evidence was offered until after the close of the hearing to show how closely the coals of the petitioner might comply with the standards set out in Exhibit No. 12, and there is no competent evidence in the record to prove petitioner's coals to be even semi-anthracite under the standards in that exhibit. Copies of certain alleged analyses of the petitioner's coals were submitted after the hearing by District Board 14 and the Binkley Coal Company of Chicago after the hearing had been adjourned.

Those analyses, however, even in the light most favorable to the petitioner do not enable us to find petitioner's coals to be anything but a high grade bituminous coal.

[fol. 309] Exhibit No. 12 is in itself an uncertain quantity if it is to be considered as a standard of classification. On the face of the exhibit, which is A. S. T. M. designation D388-36T, is the following:

"This is a Tentative Standard and under the Regulations of the Society is subject to annual revision. Suggestions

for revision should be addressed to the Headquarters of the Society, ————. Issued, 1934; Revised, 1935, 1936."

There is no explanatory evidence, nor any claim by the society which issued it that the method set out in Exhibit No. 12 is an exclusive means of determining the classification of coals.

Since the A. S. T. M. standards were issued subsequent to the adoption of the Act of 1937, it is logical they were not considered by Congress. This is substantiated by the fact that Section 17 (b) of the Act defines lignite to be a coal having calorific value in B. T. U. of 7600 per pound or less and having a natural moisture content in place in the mine of 30% or more while lignite is defined by the A. S. T. M. as having less than 8300 B. T. U.'s on a moist mineral-matter-free basis. Moreover, the A. S. T. M. does not provide for a rank of coal known as semi-bituminous, while the Act does.

Petitioner's argument that the Act only regulates bituminous coal within the districts established therein, and that its coal being semi-anthracite under the A. S. T. M.'s standards, is not bituminous within the meaning of the Act, is in conflict with the obvious intention of Congress,

Apparently, the provisions of the Act defining the coals intended to be regulated are not free from ambiguity and are therefore open to construction. When the meaning of terms used in a statute are ambiguous or when doubt is cast upon them by a construction attempted to be placed upon them, it is permissible to resort to the legislative history of the law to ascertain the true intention of the legislature. *U. S. v. Missouri Pacific Railway Company* (1929), [fol. 310] 278 U. S. 269; *Mennen Company v. Federal Trade Commission* (C. C. A. 2nd, 1923), 288 Fed. 274, 30 A. L. R. 1120, 1126; *Suckowski v. Norton* (D. C. Pa.), 16 Fed. Supp. 677; 59 C. J. #605, p. 1018.

An examination of the legislative history of the Act (See Report of Ways and Means Committee, House of Representatives, 75th Congress, 1st Session, Report No. 294, accompanying H. R. 4985, and appendix thereto) clearly discloses that Congress intended to regulate interstate commerce in all coal in the United States except known anthracite and lignite as defined in Sec. 17 (b) thereof.

From the very beginning of legislative action, Congress clearly has considered the bituminous coal industry to in-

clude all coal produced within the United States except the Pennsylvania anthracite region. The coal produced in every county in Arkansas has always been treated as bituminous coal for legislative purposes. This was true under the U. S. Fuel Administration during the World War and it was so considered in the report of the U. S. Coal Commission in 1923. The legislative committee reporting on Senate Bill #2925 in 1932 (72nd Congress, 1st Session) also treated the Arkansas coals as bituminous. During the N. R. A. the coals produced in Arkansas were regulated as a part of the bituminous coal industry by the Code Authority set up for the regulation of that business.

The Bituminous Coal Conservation Act of 1935 differed from the plan of regulation under the N. R. A. only in respect to certain constitutional requirements. In the Act of 1935 the boundaries of the districts with respect to Arkansas and the definition of bituminous coal were the same as in the Act of 1937. (Sec. 19 and annex of the Bituminous Coal Conservation Act of 1935.)

[fol. 311] Although it is not proved here, if we were to concede, arguendo, that the coals of petitioner and intervenors are "semi-anthracite" as defined by the A.S.T.M., yet it does not follow that Congress intended to exclude it from regulation. The mere fact that the term "semi-anthracite" is not mentioned in Sec. 17 (b) of the Act does not prevent the word "bituminous" from having the ordinary meaning which has been given to it throughout the history of coal legislation. Nor can it be said that where in Sec. 17 (b) Congress defined bituminous coal to include bituminous, semi-bituminous, and sub-bituminous and excluded lignite, it intended "semi-anthracite" to be excluded. The terms "includes" and "include" are not words of limitation but words of extension and enlargement. See *Jacksonville Terminal Co. v. Blanchard* (Fla.), 82 So. 300; *Wyatt v. City of Louisville* (Ky.), 267 S. W. 146; *Helvering v. Morgan's, Inc.*, 93 U. S. 121; *American Surety Co. v. Marotta*, 287 U. S. 513, 77 L. Ed. 466, 468.

It follows, therefore, that by the use of the term "semi-bituminous" in the Act, Congress intended to deal with superbituminous coal, and we hold that semi-bituminous coal is superbituminous coal, and that the terms semi-bituminous and semi-anthracite when applied in determining the rank of coals for the purposes of regulation under the

Act are synonymous terms and must be considered one and the same. This conclusion results from a consideration of the generally accepted meaning of the term "semi-bituminous" and the natural division of the coals by rank, and the fact that the words "anthracite" and "lignite" are nouns and that the word "bituminous" is an adjective. It must be assumed that Congress intended to treat anthracite, and [fol. 312] lignite as defined in the Act, as commodities separate and apart from coals possessing the physical characteristics that distinguish bituminous coals.

The classification of coals by rank claimed to be approved by the A.S.T.M. is as follows: "Meta-anthracite; anthracite; semi-anthracite. Low volatile bituminous coal; medium volatile bituminous coal; high volatile A bituminous coal; high volatile B bituminous coal; high volatile C bituminous coal. Sub-bituminous A coal; sub-bituminous B coal; sub-bituminous C coal, lignite and brown coal." (See Exhibit No. 12, p. 2.) This system of classification is one of several methods of analyses and is the method this society has selected to analyze and rank coals for scientific purposes; and for its own convenience it can well use the above names and ranking. No one has submitted them for any other purpose except the petitioner and intervenors, and they are not of sufficient permanency or in such general use as to justify their exclusive use here.

There is no evidence in the record nor does it appear when, if ever, a classification of coals known as "semi-anthracite" was used or established by anyone else. Prior to the alleged approval of the above classification by the A.S.T.M. the rank of "semi-bituminous" and "bituminous" coal was recognized, but not so with "semi-anthracite" and there is no claim that the coal of applicant and intervenors is anthracite even in the testimony of D. A. McKinney, president of one of the intervening companies, or of the president of the Sunshine Anthracite Coal Company. There is no evidence that Spadra coal, whatever its trade name, was ever ranked as anthracite. However, it is clear "semi-anthracite" as described must be descriptive of coal that is part anthracite and part bituminous and partaking of the characteristics of both. In other words, it is synonymous with [fol. 313] semi-bituminous. If it were sub-bituminous it is logical that it would be less than bituminous or approaching lignite, and it is only logical to conclude that Spadra coal,

if it contains characteristics of bituminous and anthracite, necessarily would be included with other bituminous coals of the same field. It is, therefore, logical to conclude that Congress intended to regulate as bituminous all coals below the rank of anthracite and above lignite as defined in the Act. Especially is this true when we pursue this line of thought in conjunction with the legislative history of the Act, which is above considered and which shows these coals to be produced within an area definitely described in a district or field which was regarded by Congress as a bituminous coal producing district or field.

A standard to distinguish generally between anthracite and bituminous coal has been judicially approved and is set out at length in the case of *Heisler v. Thomas Colliery Company*, 260 U. S. 245, in which the Supreme Court quoted with approval from the opinion of the Supreme Court of Pennsylvania wherein the principal distinguishing characteristics between anthracite and bituminous coal are found to be as follows:

"Anthracite coal differs from bituminous coal in the following properties: The amount of fixed carbon, the amount of volatile matter, color, luster, and structural character. The percentage of fixed carbon in anthracite coal is much higher than in bituminous. Anthracite coal is hard, compact, and comparatively clean and free from dust and is commonly termed "hard coal", while bituminous coal is very much less hard, and is dusty and dirty and is commonly termed "soft coal" (hence) bituminous coal burns with more or less smoke while anthracite coal burns with practically no smoke.

"The fuel ratio of bituminous coal differs from that of anthracite coal: as the fuel ratio of bituminous coal rises the coal is more soft, as the fuel ratio of anthracite rises the coal is more hard."

The Court definitely distinguishes between anthracite and bituminous and does not consider anything which might be [fol. 314] called "semi-anthracite". To create an in-between classification not mentioned in the Act only injects a classification impossible to properly define and would lead to intricacies and situations wholly impracticable in the administration of this law. The simple definition used by the Court is a practical and not too technical disposition of the

differences between the two coals, and it must be presumed that Congress passed the National Bituminous Coal Act of 1937 with due regard to such decisions and the established classification as so approved by the Court.

It has been held that facts which can be reasonably conceived of as having existed when the Law was enacted, will be assumed to justify the enactment of the Law and it makes no difference that such facts may be disputed or the effect opposed by argument or opinion. *Lindsley v. Natural Carbonic Gas Company*, 220 U. S. 61; *Crescent Coal Company v. Mississippi*, 257 U. S. 129; *Rast v. VanDemon*, 240 U. S. 342.

The evidence in the record herein shows that the coals of petitioner and intervenors fall short of the description of anthracite and clearly come within the definition of bituminous as the two coals are distinguished and defined in the *Heisler* case, *supra*.

While chemical analysis, including the proper fuel ratio, is an important element to be considered, other necessary factors for a proper ranking of coals are physical features or structure and burning characteristics. This Commission, and the former Commission, found it impossible to classify coals upon chemical analysis alone, and since the contention of the petitioner and intervenors stands solely upon chemical analysis, and because of other reasons herein stated, their petition must fail.

After lengthy hearings under the Bituminous Coal Act of 1935, the Commission by its Order No. 17 determined that [fol. 315] analyses, physical features, burning characteristics, and market history must be considered in the classification of coals. Again under the Bituminous Coal Act of 1937, by Order No. 38 the Commission determined that coal must be classified by considering physical features, burning characteristics and analyses. These orders were issued by the two Commissions after long and complete hearings and after due consideration of evidence and opinions from leaders of the industry and recognized experts to the effect that analysis alone is not sufficient to classify coals. It is, therefore, apparent that something more than the attempted analyses of the coal of the petitioner must be considered to determine whether this coal is bituminous or anthracite.

If we should draw fine distinctions based upon analysis between anthracite and bituminous coal, or between the various qualities of coal, or establish a classification known as

"semi-anthracite" coal or some other in-between classes of coal, we would be led into impracticable problems of regulation. Our determination must be upon a sound, practical basis and not alone upon the fine distinctions that can be and may be established by a chemical analysis.

To achieve the broad social and economic objectives of the Act, and to place the administration thereof upon a practical basis, we must consider not only chemical analyses, physical structure and burning characteristics, but also competitive market conditions, uses and historical circumstances.

It is apparent that while coals from one mine may have a carbon content of 86%, another mine a short distance away might produce the same coal with a carbon content of 92%, or there may be less than one per cent difference, yet for all practical purposes, the coals are the same; so it is in the "Spadra" field.

[fol. 316] For all practical purposes, the coals produced from the Hartshorne Seam, including the Spadra and adjoining fields and the coals of the petitioner and intervenors, are the same as the coals of their competitors and all is bituminous coal as contemplated in Section 17 (b) of the Act and we so hold.

At the close of the argument the record was again submitted to and considered by the Commission for ruling upon the questions presented by the exceptions.

The separate exceptions of the petitioner and intervenors to the Proposed Report of the Commission are overruled and the petitions for exemption filed by the Sunshine Anthracite Coal Company, the Diamond Anthracite Coal Company and the D. A. McKinney Coal Company are each denied. Appropriate orders will be entered accordingly.

By the Commission.

This 31st day of August, 1938.

F. Witheer McCullough, Secretary.

[fol. 317] CITY OF WASHINGTON,
District of Columbia, ss:

AFFIDAVIT OF SERVICE

W. B. Roberts, 3rd, Assistant to the Secretary, National Bituminous Coal Commission, being first duly sworn, on his oath deposes and says: That he served upon the Consumers' Counsel, upon the District Boards and Statistical

Bureaus of the Commission, upon Henry Adamson, Attorney-at-Law, Terre Haute, Indiana, upon Sunshine Anthracite Coal Company, Clarksville, Arkansas, upon Herbert E. Howard, President, Sunshine Anthracite Coal Company, 230 North Michigan Avenue, Chicago, Illinois, upon G. O. Patterson, Jr., Attorney-at-Law, Clarksville, Arkansas, upon C. S. Christian, President, Diamond Anthracite Coal Company, Little Rock, Arkansas, and upon D. A. McKinney, President, D. A. McKinney Coal Company, Clarksville, Arkansas, a true and correct copy of Opinion entered in Docket No. 68-FD, true and correct copy of which is attached hereto and made a part hereof, by mailing it properly addressed with postage prepaid to the above named parties on the 31st day of August, 1938.

(Sgd.) W. B. Roberts, 3rd.

Subscribed in my presence and sworn to before me this 7th day of September, 1938.

(Sgd.) Irene L. Wiese, Notary Public. (Seal.) My commission expires December 1, 1941.

[fol. 318] United States Department of the Interior

National Bituminous Coal Commission

Washington, D. C.

ORDER—At a Regular Session of the National Bituminous Coal Commission Held at Its Offices in Washington, D. C., on the 31st day of August, 1938

Docket No. 68-FD

Investigation to Determine Whether or Not Certain Coals in the State of Arkansas Are Subject to the Provisions of the Bituminous Coal Act of 1937, and for the Further Purpose of Hearing Petitions for Exemption as Provided for by Orders Nos. 28 and 53;

And

In the Matter of the Petition of Sunshine Anthracite Coal Company for Exemption Under Sub-Section (b) of Section 17 of the Bituminous Coal Act of 1937, et al.

ORDER—Aug. 31, 1938

It appearing that on the 24th day of September 1937, the National Bituminous Coal Commission entered its Order No. 53 providing for a public hearing to be held at the Gold-

man Hotel, Fort Smith, Arkansas, on the 4th day of October 1937, for the purpose of receiving evidence to enable the Commission to determine whether certain coals in the State of Arkansas are subject to the provisions of the Bituminous Coal Act of 1937, and for the further purpose of hearing petitions for certificates for exemption as provided for by Order No. 28, and for the further purpose of hearing evidence upon the petition of the Sunshine Anthracite Coal Company filed pursuant to said Order No. 28. The Commission assigned the cause to an examiner of the Commission for a hearing at the time and place designated by said Order No. 53; and

It further appearing that due and proper notice of said hearing was given to all interested parties and the cause came on to be heard pursuant to Order No. 53 and that a hearing was held, with opportunity for all interested parties to be heard and to present evidence. At said hearing, the Diamond Anthracite Coal Company and the D. A. McKinney Coal Company, each of Clarksville, Arkansas, intervened, participated in the hearing and subsequently filed formal petitions for certificates of exemption. The evidence being heard and submitted to the examiner, the examiner filed his report in the above entitled matter with the Secretary of the Commission on December 3, 1937, copies of which were thereafter served upon interested parties in conformance with Rule XXIII of the Rules of Practice and Procedure of the Commission.

[Vol. 319] Thereafter, on January 21, 1938, the Sunshine Anthracite Coal Company moved to dismiss the petition and for leave to withdraw all papers filed therewith. This motion was denied by the Commission on February 3, 1938. On February 14, 1938, the Diamond Anthracite Coal Company and the D. A. McKinney Coal Company each filed exceptions to the Report of the Examiner.

Subsequently, on the 28th day of April, 1938, the Commission filed the Proposed Report of Commission containing findings of fact and conclusions. A true copy of said Proposed Report of the Commission was served upon the interested parties on May 7, 1938, together with notice that exceptions thereto could be filed within thirty days and that any of said parties might apply for oral argument within said time limit. The Sunshine Anthracite Coal Company, the D. A. McKinney Coal Company and the Diamond Anthracite Coal Company duly filed separate exceptions to the Proposed Report of the Commission. The Sunshine

Anthracite Coal Company filed a request to be heard upon oral argument, and the same being granted, oral argument upon behalf of said company was presented to the Commission on the 7th day of July, 1938. Whereupon, the record and evidence was again considered by the Commission; and

The Commission being fully advised of the evidence adduced at the hearing as the same is contained in the official transcript of the testimony herein, and after argument finds that the findings of fact and conclusions submitted by the examiner are, in all respects true and correct, and that the findings of fact and conclusions contained in the Proposed Report of the Commission as filed herein are true and correct and are hereby adopted as the findings of fact and conclusions of the Commission; and the Commission further finds, for reasons stated in the separate opinion filed herein, that the exceptions filed to the Proposed Report of the Commission should be overruled.

Now, Therefore, it is by order determined:

1. That the underlying coal in the counties of Washington, Crawford, Sebastian, Scott, Madison, Franklin, Logan, Johnson, Pope, Yell and Conway, in the State of Arkansas is bituminous coal within the meaning of the Bituminous Coal Act of 1937, and is therefore subject to the provisions of said Act.

2. That the exceptions of the Diamond Anthracite Coal Company and the D. A. McKinney Coal Company to the Proposed Report of the examiner are each and severally overruled.

3. That the separate and respective exceptions of the Diamond Anthracite Coal Company, the D. A. McKinney Company and the Sunshine Anthracite Coal Company to the Proposed Report of the Commission are hereby each and severally overruled:

4. That each of the separate petitions for certificates of exemption from the provisions of the Bituminous Coal Act of 1937 filed by the Diamond Anthracite Coal Company, the D. A. McKinney Coal Company and the Sunshine Anthracite Coal Company are hereby denied.

By order of the Commission.

Dated this 31st day of August 1938.

F. Witcher McCullough, Secretary. (Seal.)

[fol. 320] CITY OF WASHINGTON,
District of Columbia, ss:

AFFIDAVIT OF SERVICE

W. B. Roberts, 3rd, Assistant to the Secretary, National Bituminous Coal Commission, being first duly sworn, on his oath deposes and says: That he served upon the Consumers' Counsel, upon the District Boards and Statistical Bureaus of the Commission, upon all Code Members in District No. 14, upon the petitioner, the Sunshine Anthracite Coal Company, Clarksville, Arkansas, upon Herbert E. Howard, President, Sunshine Anthracite Coal Company, 230 North Michigan Avenue, Chicago, Illinois, upon G. O. Patterson, Jr., Attorney-at-Law, Clarksville, Arkansas, upon C. S. Christian, President, Diamond Anthracite Coal Company, Little Rock, Arkansas, and upon D. A. McKinney, President, D. A. McKinney Coal Company, Clarksville, Arkansas, and upon Henry Adamson, Attorney-at-Law, Terre Haute, Indiana, a true and correct copy of Order entered in Docket No. 68-FD, true and correct copy of which is attached hereto, and made a part hereof, by mailing it properly addressed with postage prepaid, to the above named parties on the 31st day of August, 1938.

(Sgd.) W. B. Roberts, 3rd.

Subscribed in my presence and sworn to before me this 7th day of September, 1938.

(Sgd.) Irene L. Wiese, Notary Public. (Seal.) My commission expires December 1, 1941.

[fol. 321] CITY OF WASHINGTON,
District of Columbia, ss:

AFFIDAVIT OF PROOF OF PUBLICATION

W. B. Roberts, 3rd, being first duly sworn, on his oath deposes and says: That he is an employee of the National Bituminous Coal Commission and is immediately attached to the office of the Secretary; and that he caused to be and there was published in the Federal Register in the issue of the said Federal Register, dated the 3rd day of September, 1938, and being Number 173 of Volume 3 at Page 2154

of said Federal Register, Docket No. 68-FD, "Investigation to Determine Whether or Not Certain Coals in the State of Arkansas are Subject to the Provisions of the Bituminous Coal Act of 1937, and for the Further Purpose of Hearing Petitions for Exemption—In the Matter of the Petition of Sunshine Anthracite Coal Company Exemption under Sub-Section (B) of Section 17 of the Bituminous Coal Act of 1937, et al.," a true and correct copy of which is attached hereto and made a part hereof.

(Sgd.) W. B. Roberts, 3rd.

Subscribed in my presence and sworn to before me this 7th day of September, 1938. (Sgd.) Irene L. Wiese, Notary Public. (Seal.) My commission expires December 1, 1941.

[fol. 322] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE EIGHTH CIRCUIT

No. 421 Orig.

Investigation to Determine Whether or Not Certain Coals in the State of Arkansas are Subject to the Provisions of the Bituminous Coal Act of 1937 and for the Further Purpose of Hearing Petitions for Exemption as Provided for by Orders Nos. 28 and 53;

And

In the Matter of the Petition of the Sunshine Anthracite Coal Company for Exemption under Subsection (B) of Section 17 of the Bituminous Coal Act of 1937, et al.

CERTIFICATE OF THE NATIONAL BITUMINOUS COAL COMMISSION

The National Bituminous Coal Commission, by its Acting Secretary, W. B. Roberts, 3rd, having been duly authorized by Rule XIV of the "Rules for the Conduct of Commission Meetings", hereby certifies that the documents annexed hereto constitute a full and accurate transcript of the entire record in a proceeding before said Commission entitled, "Investigation to Determine Whether or Not Certain Coals in the State of Arkansas are Subject to the Provisions of the Bituminous Coal Act of 1937 and for the Further Pur-

pose of Hearing Petitions for Exemption as Provided for by Orders Nos. 28 and 53; and In the Matter of the Petition of the Sunshine Anthracite Coal Company for Exemption under Subsection (b) of Section 17 of the Bituminous Coal Act of 1937, et al.", the same being Docket No. 68-FD before said Commission. Such transcript includes the application, testimony, and evidence upon which the order of the Commission in said proceedings was entered, and includes also the findings and report of the Examiner, and exceptions thereto, and the opinion, findings and order of the Commission.

Fully enumerated, said documents attached hereto are as follows:

1. Order No. 28 of the National Bituminous Coal Commission, dated July 27, 1937, and entitled, "An Order Providing [fol. 323] for the Determination of the Character of any Coal and the Issuance of Certificates of Exemption to Producers of Coals other than Bituminous, Semi-Bituminous and Sub-Bituminous."

- (a) Affidavit of Proof of Publication of said order in Federal Register.

2. Application of the Sunshine Anthracite Coal Company for exemption from the provisions of the Bituminous Coal Act of 1937, dated August 31, 1937, and filed with the Commission on September 10, 1937, pursuant to Order No. 28 of the National Bituminous Coal Commission. Exhibits (a), (b), (c), (d), (e), (f), (g), (h), (i), (j), (k) and (l), attached to said application, are hereinafter referred to in Paragraph 7 hereof, as Exhibits Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12, respectively.

3. Application of Diamond Anthracite Coal Co. for exemption.

4. Application of D. A. McKinney Coal Co. for exemption.

5. Order No. 53 of the National Bituminous Coal Commission, dated September 24, 1937, and entitled, "An Order Providing for a Public Hearing for the Purpose of Receiving Evidence to Enable the Commission to Determine Whether or not Certain Coals in the State of Arkansas are Subject to the Provisions of the Bituminous Coal Act of 1937, and for the Further Purpose of Hearing Applica-

tions for Exemption as Provided for by Order No. 28," together with—

(a) Affidavit by Sherman E. Burt, Assistant to the Secretary of the National Bituminous Coal Commission, of Proof of Publication, verified September 27, 1937.

(b) Affidavit by said Sherman E. Burt of Proof of Service upon District Board No. 14, Consumers' Counsel, Deputy Commissioner of Internal Revenue, and the Sunshine Anthracite Coal Company, verified September 27, 1937.

(c) Affidavit by Clarence A. Smith, Chief of Mails and [fol. 324] Files of the National Bituminous Coal Commission, of Proof of Service upon Consumers' Counsel, governmental agencies, District Boards, inter-office, and all interested parties on the Commission's mailing list held in the Mails and Files Section, verified September 29, 1937.

(d) Affidavit by Clarence A. Smith, Chief, of Mails and Files of the National Bituminous Coal Commission, of Proof of Service upon Consumers' Counsel, governmental agencies, District Boards, inter-office, and all interested parties on the Commission's mailing list held in the Mails and Files Section, verified October 6, 1937.

(e) Affidavit by E. J. Earley of Proof of Publication in the Federal Register, verified November 4, 1937.

6. Order assigning to Examiner Carman A. Newcomb the conduct of a hearing in Docket No. 68-FD and directing the time and place of said hearing.

7. List of "Registrations at hearing, Fort Smith, Arkansas, October 4, 1937."

8. Stenographic transcript of testimony before Carman A. Newcomb, Trial Examiner for the National Bituminous Coal Commission, commencing on October 4, 1937.

9. Documentary Exhibits introduced into evidence on October 4, 1937, as follows:

(a) Exhibit No. 1: Letter dated August 28, 1937, from the Ozark Smelting and Mining Company to the Binkley Coal Company, Chicago, Illinois.

(b) Exhibit No. 2: Purchase Order No. 156-GS-36 of the War Department, dated July 9, 1935, to the Binkley Coal Company, Chicago, Illinois.

(c) Exhibit No. 3: Item No. 20, Sheet No. 26, No. 199-36-290-GS, entitled, "Schedule of Requirements," and being Requisition No. 824-76-36 for the Quartermaster, Scott Field, Illinois.

[fol. 325] (d) Exhibit No. 4: Price List issued by the Southern Coal Company, Inc., dated June 1929.

(e) Exhibit No. 5: Direct mail advertisement of the Wiedemann-Simpson Coal Company, advertising "Sunshine Anthracite Coal."

(f) Exhibit No. 6: Price list issued by "Pittsburgh & Midway Coal Mining Company, Kansas City, Missouri" dated November 1935.

(g) Exhibit No. 7: Advertisement of the Binkley Coal Company reprinted from the September 28, 1935, issue of "The Black Diamond."

(h) Exhibit No. 8: Price list of Lehigh Valley Anthracite Coal, effective October 16, 1936, issued by the Republican Coal and Coke Company.

(i) Exhibit No. 9: Advertisement of "Standard Briquets" by the Binkley Coal Company.

(j) Exhibit No. 10: Price list, effective November 5, 1935, issued by the Co-op Coal Association.

(k) Exhibit No. 11: Price list, dated July 27, 1937, issued by Hickman, Williams and Company, Minneapolis, Minnesota.

(l) Exhibit No. 12: Release issued by the Department of Commerce, Bureau of the Census, Washington, for use in the morning papers of June 23, 1937, entitled, "Bituminous Coal Mining in the United States in 1935."

(m) Exhibit No. 13: Information Circular No. 6933 of the Department of Interior, United States Bureau of Mines, dated March, 1937, on the subject of "Curves for the Classification of Coal."

(n) Exhibit No. 14: Letter dated September 21, 1937, from George C. Branner, State Geologist of the State of Arkansas to Mr. C. S. Christian.

10. Documentary Exhibits introduced into evidence on October 5 and 6, 1937, as follows:

(a) Exhibits Nos. 1 to 6, inclusive: Specimens of coal. [fol. 326] On the hearing of this appeal, same will be presented to the court.

(b) Exhibit No. 7: "Contract by and between Arkansas and Oklahoma Coal Operators' Association and Independent Coal Operators of Arkansas and Oklahoma and Provisional District No. 21, of the United Mine Workers of America," effective May 8, 1937, expiring March 31, 1939.

(c) Exhibit No. 8: "Geologic and Economic Map and Sections of the Arkansas Coal Fields."

(d) Exhibit No. 9: "Analysis of Coal Samples from Arkansas as shown in Bulletin No. 326, Department of the Interior, United States Geological Survey, entitled, 'The Arkansas Coal Field' by Arthur J. Collier, 1907."

(e) Exhibit No. 10: "Proximate Analysis of Arkansas Coals made by the Geological Survey of Arkansas (Analysis by Dr. R. N. Brackett, assisted by Mr. J. P. Smith.)."

(f) Exhibit No. 11: Circular No. 1 (As revised April 5, 1937), entitled, "Personnel of Sectional Committee on Classification of Coal," sponsor: "American Society for Testing Materials."

(g) Exhibit No. 12: Bulletin of the American Society for Testing Materials, Philadelphia, Pennsylvania, entitled, "Tentative Specifications for Classification of Coals by Rank. A. S. T. M. designation: D 388-36 T issued 1934, revised 1935-1936."

(h) Exhibit No. 13: Map entitled, "Coal Fields of the United States" by Marius R. Campbell, dated 1926—proceedings International Conference of Bituminous Coal, Carnegie Institute of Technology, Pittsburgh, Pennsylvania.

(i) Exhibit No. 14: "Classification of Certain Arkansas Coals based upon the analysis given in United States Bureau of Mines, T. P. No. 416, 'Analysis of Arkansas Coals,' pages 9-15, inclusive."

(j) Exhibit No. 15: "Report of Investigations," No. 3283, dated July, 1935; issued by the Department of the Interior, United States Bureau of Mines, entitled "Quality of An-

[fol. 327] thracite as prepared at Breakers operated by members of the Anthracite Institute in 1935."

(k) Exhibit No. 16: "Classification of Certain Arkansas Coals by Rank based upon analysis of samples of delivered coal as published in United States Bureau of Mines, technical paper No. 416, pp. 22-23."

(l) Exhibit No. 17: Excerpt from "Coal" by Elwood S. Moore, M. A., Ph. D., from page 106, Campbell's Classification.

(m) Exhibit No. 18: Map of the "Coal Fields of Arkansas" by R. E. Welch, and issued by the Southwestern Coal Company, Fort Smith, Arkansas.

11. The following documents, analyses and report were filed subsequent to the hearing in accordance with the purported agreement made by and between William G. Gregory, Vice President, Binkley Coal Company, Chicago, Illinois, and Heber Denman, Chairman, Bituminous Coal Producers' Board for District No. 14:

(a) Letter dated October 14, 1937, from the Bituminous Coal Producers' Board for District No. 14 to F. W. McCullough, Secretary, National Bituminous Coal Commission, together with the following attached analyses:

1. Certified Analysis Report of the Kansas City Testing Laboratory, Inc., Kansas City, Missouri, Laboratory No. 192068.

2. Certified Analysis Report of the Kansas City Testing Laboratory, Inc., Kansas City, Missouri, Laboratory No. 192069.

3. Certified Analysis Report of the Kansas City Testing Laboratory, Inc., Kansas City, Missouri, Laboratory No. 192070.

(b) Letter from the Sunshine Anthracite Coal Company to the National Bituminous Coal Commission, received on or about October 27, 1937, together with enclosures referred to therein and entitled:

1. "Hard Coals" by O. E. Kiesseling.

2. Excerpt from "Coal Resources of the United States" by Marius R. Campbell and issued by the United States Department of the Interior, Geological Survey.

[fol. 328] 3. Excerpt from Information Circular IC No. 6933, and issued by the Department of Interior, Bureau of Mines, and entitled "Curves for the Classification of Coal" by J. F. Barkley and L. R. Burdick.

4. The following analyses and reports are also attached to said letter:

a. Certified Analysis Report of the Commercial Testing and Engineering Company, Chicago, Illinois, Laboratory No. 122452.

b. Certified Analysis Report of the Commercial Testing and Engineering Company, Chicago, Illinois, Laboratory No. 122455.

c. Certified Analysis Report of the Commercial Testing and Engineering Company, Chicago, Illinois, Laboratory No. 122456.

d. Certified Analysis Report of the Commercial Testing and Engineering Company, Chicago, Illinois, Laboratory No. 122457.

e. Certified Analysis Report of the Commercial Testing and Engineering Company, Chicago, Illinois, Laboratory No. 122458.

f. Certified Analysis Report of the Commercial Testing and Engineering Company, Chicago, Illinois, Laboratory No. 122459.

g. Certified Analysis Report of the Van Cleve Laboratory Company, Inc., Laboratory No. 28941.

h. Certified Analysis Report of the Van Cleve Laboratory Company, Inc., Laboratory No. 28942.

i. Certified Analysis Report of the Van Cleve Laboratory Company, Inc., Laboratory No. 28943.

j. Certified Analysis Report of the Van Cleve Laboratory Company, Inc., Laboratory No. 28944.

k. Certified Analysis Report of the Van Cleve Laboratory Company, Inc., Laboratory No. 28945.

l. Certified Analysis Report of the Van Cleve Laboratory Company, Inc., Laboratory No. 28946.

12. The following unnumbered documents were also filed subsequent to the hearing:

[fol. 329] (a) "Articles of Incorporation of the Sunshine Anthracite Coal Company."

(b) Property map of the Sunshine Anthracite Coal Company, Esparada, Arkansas, dated October, 1937.

(c) Certificate of name of officers of the Sunshine Anthracite Coal Company, dated October 12, 1937.

13. Report dated December 3, 1937, of Carman A. Newcomb, Trial Examiner, National Bituminous Coal Commission.

(a) Receipt signed by Herbert E. Howard, acknowledging for and on behalf of the applicant the receipt of a copy of the report of the examiner.

14. Exceptions of the Diamond Anthracite Coal Company to the report of the Trial Examiner.

15. Exceptions of the D. A. McKinney Coal Company to the report of the Trial Examiner.

16. Petitioner's motion, dated January 21, 1938, praying for a dismissal of its application for exemption and leave to withdraw all papers from the files of the Commission.

17. Order of the Commission dated February 3, 1938, denying the foregoing motion, together with Affidavit of W. B. Roberts, 3rd, Acting Chief of Code Membership Section, of Proof of Service upon the applicant, and verified March 7, 1938.

18. Proposed report of the Commission, containing findings of fact and conclusions, together with a notice dated May 7, 1938, giving notice of the time allowed for the filing of exceptions thereto and providing for oral argument on said exceptions, together with affidavit of Proof of Service thereof dated September 7, 1938.

19. Exceptions of the Sunshine Anthracite Coal Company to the proposed report of the Commission, filed with the Commission May 21, 1938.

20. Consolidated exceptions of the Diamond Anthracite Coal Co. and of the D. A. McKinney Coal Company to the proposed report of the Commission.

21. Applicant's request for an oral argument concerning [fol. 330] the proposed report of the Commission, and the exceptions thereto, dated May 19, 1938.

22. "Notice of Oral Argument on Exceptions to Proposed Report of the Commission," dated May 23, 1938, and issued by the Commission together with the Affidavit of Proof of Service upon the applicant, dated May 28, 1938.

23. Notice of Continuance dated May 28, 1938, and affidavit of Proof of Publication thereof in the Federal Register, dated June 3, 1938.

24. "Notice of Oral Argument on Exceptions to Proposed Report of the Commission," dated June 9, 1938, and issued by the Commission together with an affidavit of Proof of Service upon the applicant dated June 13, 1938, and Affidavit of Proof of Publication in the Federal Register, dated June 14, 1938.

25. "Opinion" and findings of fact and conclusions of the Commission, dated August 31, 1938, together with an Affidavit of Proof of Service upon the applicant verified September 7, 1938.

26. Order of the Commission, dated August 31, 1938, overruling applicant's exceptions to the proposed Report of the Commission and denying applicant's separate petition for a certificate of exception from the provisions of the Bituminous Coal Act of 1937, together with an affidavit of W. B. Roberts, 3rd, of Proof of Service upon applicant dated September 7, 1938, and Affidavit of W. B. Roberts, 3rd, of Proof of Publication in the Federal Register dated September 7, 1938.

In Testimony Whereof, I, W. B. Roberts, 3rd, the Acting Secretary of the National Bituminous Coal Commission, having been duly authorized as aforesaid, have hereunto set my hand and affixed the seal of the National Bituminous Coal Commission in the City of Washington, in the District of Columbia, this 2nd day of December, A. D. 1938.

W. B. Roberts, 3d.

Filed Dec. 8, 1938. E. E. Koch, Clerk.

[fol. 1] BEFORE NATIONAL BITUMINOUS COAL COMMISSION

In the Matter of Petition for Exemption of THE SUNSHINE
ANTHRACITE COAL COMPANY, Clarksville, Arkansas

TRANSCRIPT OF TESTIMONY BEFORE TRIAL EXAMINER

Goldman Hotel, Fort Smith, Arkansas,
October 4, 1937.

Met pursuant to notice at 10 o'clock a. m.

Before Carman A. Newcomb, Examiner

APPEARANCES:

John A. Riddle and Robert F. Waldron, Attorneys for
National Bituminous Coal Commission.

Max Milligan, Attorney for Marketing Division.

Joseph V. MacHugh, Attorney for Office of Consumers'
Counsel.

J. G. Puterbaugh, H. Denman, and S. A. Bramlette, On
behalf of District No. 14.

Hubert E. Howard and G. O. Patterson, Jr., Attorneys for
Sunshine Anthracite Coal Company.

David Fowler, Appearing for United Mine Workers.

[fol. 2] PROCEEDINGS

Examiner Newcomb: The meeting will come to order. Information has reached the examiner that there is a train forty minutes late arriving from Oklahoma. In fairness to everyone the examiner will not convene this session until ten-forty-five a. m., permitting any parties that may be on that train an opportunity to be present at the very beginning of the testimony. So until then we will be in recess.

(Thereupon, a recess was taken until ten-forty-five a. m.)

Examiner Newcomb: Let the record show the meeting reconvened. All appearance may be noted, subject to the conditions set forth in order No. 53 of the Commission.

Mr. Waldron: John A. Riddle and Robert F. Waldron appearing as attorneys for the National Bituminous Coal Commission.

Mr. Patterson: Mr. Hubert E. Howard and G. O. Patterson, Jr., appear on behalf of the Sunshine Anthracite Coal Company.

Examiner Newcomb: Does the Marketing Division have a representative here? Mr. Milligan, will you enter your appearance, please?

Mr. Milligan: Max Milligan, representing the Marketing [fols. 3-5] Division.

Mr. Bramlette: On behalf of Bituminous Coal Producing District No. 14, J. G. Puterbaugh, H. Denman, and S. A. Bramlette.

Examiner Newcomb: Any representative of the Consumers' Counsel present? For the record, show no representative of the Consumers' Counsel. Are there any other entries of appearances? If not, we will proceed.

This meeting was called pursuant to Order No. 53 of the National Bituminous Coal Commission. The Examiner will now read Order No. 53, which will be made a part of the record.

Order No. 53 omitted. Printed side page 26, ante.

[fols. 6-9] The Examiner will now read Order No. 28 of the Commission.

Order No. 28 omitted. Printed side page 1, ante.

[fol. 10] The Examiner will now read the order of assignment, designating the present Examiner to preside over this hearing.

Order of assignment omitted. Printed side page 33, ante.

[fol. 11] The order of procedure during these sessions will be as follows, gentlemen. The Commission will first entertain the case of the Sunshine Anthracite Coal Company's application for exemption. After that matter has been completed the Commission will then entertain applications for exemption of other producers. After that portion of the order has been completed the Commission will then entertain such evidence, exhibits, and testimony presented by producers of coal in District No. 14 to ascertain what coals are produced in said district and if said coals are bituminous or not.

Are there any questions? If not, we will proceed with the Sunshine Anthracite Coal Company matter. Mr. Patterson you are the attorney of record. Do you have an opening statement to make?

Mr. Patterson: If the Examiner please, Mr. Howard will make the statement on behalf of the Sunshine Anthracite Coal Company:

[fol. 12] Examiner Newcomb: Mr. Howard.

Mr. Howard: Mr. Examiner, I will read certain portions of the petition of the Sunshine Anthracite Coal Company. (Reading.)

Sunshine Anthracite Coal Co.

Clarksville, Arkansas

Chicago Office, 230 North Michigan Avenue

August 31, 1937.

United States Department of the Interior
National Bituminous Coal Commission,
Washington, D. C.

GENTLEMEN:

Pursuant to Order No. 28, "An Order Providing for the Determination of the Character of any Coal and the Issuance of Certificates of Exemption to Producers of Coals Other than Bituminous, Semi-Bituminous, and Sub-Bituminous," we herewith apply for a certificate exempting our Arkansas Anthracite coal from the operation and effect of the Bituminous Coal Act of 1937, "An Act to Regulate Interstate Commerce in Bituminous Coal, and for Other Purposes." The Act stipulates (Section 17 (b)) that "the term 'Bituminous coal' includes all bituminous, semi-bituminous, and sub-bituminous coal and shall exclude lignite, which is defined as a lignitic coal having calorific value in British thermal units of less than seven thousand six hundred [fol. 13] dred per pound and having a natural moisture content in place in the mine of 30 per centum or more."

Arkansas coal from the Spadra field has been known and sold as anthracite coal for over thirty years. However, it would be classified as "semi-anthracite" according to the American Society for Testing Materials Classification of Coals by Rank shown on Page 68 of their bulletin published in September 1934 for Committee D-5 on Coal and Coke. Class I Anthracitic, Group 3 Semi-anthracite specified the limits of fixed carbon or B. T. U. mineral-matter-free basis "Dry Fixed Carbon, 86 per cent or more and less than 92 per cent (Dry Volatile Matter, 14 per cent or less and more

than 8 per cent)" with requisite physical properties "Non-agglutinating."

Following is the information called for in Order No. 28: Name of Applicant: Sunshine Anthracite Coal Company. Post-office address: Clarksville, Arkansas. Name of mine: Sunshine. Location: Clarksville, Johnson County, Arkansas. Field: Spadra. Tonnage produced: 1934: November, 68.85 tons; December, 1,211.75 tons. 1935, total, 17,624.07 tons; 1936 total, 10,935.05 tons. 1937: January, 1,436.20 tons, February, 37.55 tons, March, 412.65 tons. Total 1,886.40 tons.

The coarse coal from this mine has been sold for domestic heating purposes generally throughout the central west. [fol. 14] For example, we have sold coarse coal to the Leighton Fuel Company, Minneapolis, Minnesota, and to the Gray-Bryan-Sweeney Coal Company, Kansas City, Missouri. All have advertised and sold this coal as Arkansas Anthracite.

We have sold our slack or fine coal to the following smelters who buy the Arkansas Anthracite because they must have a coal which is non-agglutinating:

The Ozark Smelting and Mining Company, Coffeyville, Kansas. Eagle-Picher Smelting and Mining Company, Henryetta, Oklahoma.

We have also sold slack or fine coal for several years to the Standard Briquet Fuel Company (since July 1, 1935, Binkley Coal Company (Briquet Plant), Kansas City, Missouri, to make a free-burning or non-agglutinating briquet.

We have also furnished through the Binkley Coal Company five inch by two inch egg coal to the Quartermaster, Fort Snelling, Minnesota, bidding on standard bid form specifically calling for Arkansas Anthracite.

We have also shipped 5½ inch by 2½ inch egg coal to the Quartermaster, Scott Field, Belleville, Illinois, bidding on United States Government forms calling for Arkansas Anthracite.

The coal seam at the Sunshine Mine varies in thickness from fifty-one inches to fifty-six inches. University of Arkansas Engineering Experiment Station Bulletin No. 5 dated November, 1928 has this to say about Arkansas Anthracite: "Arkansas Anthracite is produced in Johnson and Pope Counties, and is strictly a domestic coal. It is smokeless and is adapted to furnace, grate, ranges, and water heaters."

Two Bureaus of Mines' analyses covering shipments of a total of 1,834.35 tons of five inch by two inch Sunshine egg coal to Fort Snelling, Minnesota, from August 12 to September 5, 1935, are shown.

From the analysis on a dry mineral-matter-free basis, it will be noted that Sunshine Anthracite coal has a fixed carbon content of 87.1 per cent or 1.1 percent more than necessary to cause it to fall within the semi-anthracite classification.

Reference has been made to Bulletin No. 5 of the Engineering Experiment Station of the University of Arkansas.

In the annual Report of the State Inspector of coal mines, State of Arkansas for the year 1924, is shown an analysis of coal from Spadra, Arkansas, made by the U. S. Geological Survey Laboratory No. 3,368 as follows: "As received." Moisture 2.11, ash 8.64, volatile matter 11.42, fixed carbon 77.83. B. t. u. 13,714, sulphur 1.99. This analysis on a dry mineral-matter-free basis would be: Vol[fol. 15½]atile matter 11.24, fixed carbon 88.76. B. t. u. 15,564.

This analysis also shows the Spadra coal to be in the Semi-Anthracite classification because the volatile matter on a dry mineral-matter-free basis is 88.76 per-cent or 2.76 per cent more than the minimum of 86 per cent specified in the A. S. T. M. specifications.

The Interstate Commerce Commission recognized that the Arkansas Anthracite coal from the Spadra field was in a distinctive class by setting freight rates on the coarse coal higher, twenty-five cents per ton, than on coal from adjoining fields. Missouri Pacific Freight Tariff No. 4410, I. C. C. No. A8924 gives a rate on coarse coal to Kansas City, Missouri, from the Spadra field, Group 12, of \$2.90 per ton and to the same point from shipping points falling in Group No. 9 of \$2.65 per ton.

[fol. 16] - At this point, Mr. Examiner, if I may, I will call as a witness Mr. Gregory.

Examiner Newcomb: Before you call your first witness, Mr. Howard, I would like to ask if there are any other opening statements desired to be made at this time. Does the Solicitor's Office of the Commission desire to make an opening statement?

Mr. Riddle: We have no statement to make.

Examiner Newcomb: Does the District Board No. 14 have any opening statement to make at this time?

Mr. Puterbaugh: We have none.

Examiner Newcomb: You may call your first witness, Mr. Howard.

Mr. Howard: We will call Mr. Gregory.

Examiner Newcomb: Mr. Gregory, will you be sworn, please?

WILLIAM G. GREGORY, Vice President Binkley Coal Company, Chicago, Illinois, was duly sworn and testified as follows:

Direct examination.

By Mr. Howard:

Q. Will you state your full name?

A. William G. Gregory.

Q. And your business.

A. I am Vice President of the Binkley Coal Company, [fol. 17] Chicago, Illinois.

Q. In charge of what department?

A. Sales.

Q. How long have you been in the coal business, Mr. Gregory?

A. Twenty-one years.

Q. And just briefly what has been your experience in that twenty-one years.

A. I have devoted practically all that time to the selling of coal in the middle west.

Q. What part, please, sir?

A. Arkansas, Illinois, Indiana. I have sold a good deal of West Virginia coal and some lignite, some bituminous, some semi-anthracite, and some anthracite.

Q. Has any part of your time been spent in the Arkansas field?

A. Yes, a good deal; I lived here in Fort Smith twenty years ago.

Q. For how long?

A. For one year.

Q. And since that time have you been constantly familiar with the Arkansas coals?

A. Yes, sir.

Q. And you have sold Arkansas coals each year during that time?

[fol. 18] A. Yes, sir.

Q. You are familiar with the Spadra field in Arkansas?

A. Yes, sir.

Q. Under what designation has that coal been sold to the trade during that period?

A. Arkansas anthracite. I never heard it sold as anything else.

Q. The Sunshine mine of the Sunshine Coal Company is located where?

A. In Johnson County, near Clarksville, Arkansas.

Q. That is in the Spadra field?

A. Yes.

Q. I show you a photostatic copy of a letter purporting to be a letter from the Ozark Smelting and Mining Company, addressed to the Binkley Coal Company, attention Mr. Gregory.

Examiner Newcomb: Will you pardon an interruption, Mr. Howard.

Mr. Howard: Yes, sir.

Examiner Newcomb: I want the appearance of Mr. Joseph Machugh, representing the office of the Consumers' Counsel be shown. Mr. Howard, I am going to ask the reporter, if you will indulge me, to read back what you have stated in your opening statement, for the benefit of [fol. 19] Consumers' Counsel, and as far as we have gone, when he returns with his brief case. I ask the indulgence of everyone, if you do not mind. We will take a short recess until Mr. Machugh returns.

(Thereupon, a short recess was taken.)

Examiner Newcomb: I understand there is a representative of the United Mine Workers here who desires to enter his appearance. I understand he is making a protest to the application of the Sunshine Anthracite Coal Company.

Would you give us your full name?

Mr. Fowler: David Fowler.

Examiner Newcomb: And your official position?

Mr. Fowler: President of the United Mine Workers of America, District 21, and a member of the Code Board No. 14.

Examiner Newcomb: And what is your interest in this matter, Mr. Fowler?

Mr. Fowler: On behalf of the coal miners that have a contract with the Sunshine Coal Company.

Examiner Newcomb: Do you want to make an opening statement?

Mr. Fowler: Yes.

Examiner Newcomb: You are here for what purpose, [fol. 20] Mr. Fowler?

Mr. Fowler: I am here for the purpose of protesting against giving the Sunshine Anthracite Coal Company any leeway over the rest of the bituminous fields because we do not class this coal as an anthracite coal. It is not contracted that way in our working agreements. Our differentials are based on the selling prices when these contracts have been arranged and when they smash those selling prices then it destroys the differential that is granted between us and the anthracite coal field and also Illinois and other fields. If any concession is granted, then they must reopen the contract and surrender the differential between here and the anthracite coal fields. I came from the anthracite coal fields, I have worked in them since I was a boy in Pennsylvania, and there is as much difference in this coal and that coal as night and day. It is a bastard anthracite; it is not bituminous or anthracite.

Examiner Newcomb: Mr. Fowler, at this time the Examiner will not entertain any argument. You will have full opportunity upon the completion of the Sunshine Coal Company's side of the case to protest, you and any other parties that wish to protest and present any evidence.

Mr. Fowler: That is all right.

[fol. 21] Examiner Newcomb: Does the Consumers' Counsel want to make an opening statement?

Mr. Machugh: If the Examiner please, my name is Joseph V. Machugh, of the office of Consumers' Counsel of the National Bituminous Coal Commission, Washington, D. C. I should like to have the record show in explanation of my tardy arrival at this hearing that the Missouri-Pacific train on which I arrived was four and one-half hours late. I asked the conductor, R. L. James, to have the train master, D. C. Murphy, wire the hotel and request, if it met with the approval of the Examiner, that this hearing be continued until two o'clock this afternoon. I understand that wire was not received.

Examiner Newcomb: The record will show that the Examiner has not received such a wire.

Mr. Machugh: May I read a statement into the record, if the Examiner please, entirely apart from my remarks later on?

I am appearing at these hearings as a representative of the office of the Consumers' Counsel, one of whose functions under the National Bituminous Coal Act of 1937 it is to attend any proceedings before the National Bituminous Coal Commission and represent the interests of bituminous coal consumers during such proceedings. It is our desire that any consumers who may have an interest in the subject [fol. 22] matter of this hearing should know of our presence and of our desire to be of any possible assistance to them. Our office represents all classes of bituminous coal consumers, large, small, organized and unorganized. If any consumer or other interested party desires to confer with me on any subject matter affecting consumers either during a recess of this hearing or in the evening, I shall be glad to talk with him at the Goldman Hotel. Any information which a consumer has dealing with Arkansas produced or consumed coal and which he wishes to furnish to the office of Consumers' Counsel will be gratefully received and carefully considered. If any consumer desires to be heard on the subject matter of this hearing, an opportunity to do so will be given to him. In order to facilitate the progress of the hearing it is requested that any consumer wishing to be heard will make his desire known to the Examiner at this time.

Mr. Examiner, that completes the statement which the office of Consumers' Counsel wishes to make at the opening of this hearing. Thank you, sir.

Examiner Newcomb: You have heard the invitation of Consumers' Counsel representative here inviting any consumer, large or small, to confer with him and offering his services to you.

[fol. 23] Mr. Machugh, the meeting was opened at ten o'clock and was delayed some thirty minutes because I understood a train from Oklahoma was about thirty minutes late in its arrival. I delayed the opening of the hearing for the benefit of anyone that might be on that train that was an interested party. The Examiner read Order No. 53 and Order No. 28 of the Commission, which Order No. 53 was based on, and also the order of assignment. Then Mr. Howard, President of the Sunshine Anthracite

Coal Company, read certain excerpts of the petition that he filed with the Commission, which the reporter will read to you if you wish to hear it.

Mr. Machugh: Is there an extra copy of the petition? I would like to have one.

Mr. Howard: I am sorry there is not, but we will furnish one for you if you wish it.

Examiner Newcomb: The reporter will read to you that portion of the petition of the Sunshine Anthracite Coal Company, or the Examiner will lend you the docket here which contains the petition of the Sunshine Anthracite Coal Company. That may be a time saver if you care to pursue that course, Mr. Machugh.

Mr. Machugh: I will act on your judgment in the matter, Mr. Examiner.

Examiner Newcomb: Then Mr. Howard had just called [fol. 24] as his first witness Mr. Gregory, who is Vice President of the Binkley Coal Company of Chicago.

(A discussion was had off the record.)

Examiner Newcomb: Mr. Gregory, will you take the stand again?

By Mr. Howard:

Q. Mr. Gregory, I will ask you at this point what relation does the Binkley Coal Company bear to the Sunshine Anthracite Coal Company, with reference to sales of coal.

A. The Binkley Coal Company sells the entire production of the Sunshine Anthracite Coal Company.

Q. And they are their general sales agents?

A. Yes, sir.

Q. I will ask you if this is a letter you received from the Ozark Smelting and Mining Company?

A. It is. The original is on file with the Commission.

Mr. Howard: (Reading from letter) "Binkley Coal Company, Chicago, Illinois."

Mr. Waldron: We object to the reading of this letter. He has not identified it as an exhibit, the party who signed the letter is not present, and the original is now, according to the witness, in possession of the Binkley Coal Company. [fol. 25] The original letter would be the best evidence. We have no chance whatever to cross-examine on matters or statements made in this letter.

Examiner Newcomb: The original of this letter is on file with the Commission and is in possession of the Examiner as part of the docket.

Mr. Waldron: Mr. Examiner, we have no chance or opportunity whatsoever to cross-examine the gentleman who signed this letter, and therefore we object to the reading of it in the record.

Examiner Newcomb: Overruled. It is part of the record. It is on file and it is part of the docket.

Mr. Waldron: Mr. Examiner, I desire the record to show that we have no opportunity to cross-examine the gentleman who signed this letter.

Examiner Newcomb: You may proceed.

Mr. Howard: (Reading:)

"Coffeyville, Kansas,
August 28, 1937.

Binkley Coal Company, 230 No. Michigan Avenue, Chicago, Illinois.

Attention: Mr. W. G. Gregory, Vice President

DEAR SIR:

Please refer to my letter of August 23rd replying to your letter of August 20th.

[fol. 26] Mr. Hain advises that inasmuch as we have been handling the matter thus far he thought it would be advisable to continue to do so. In view of this, we will, therefore, give you the information desired.

It has been proven many times in our operation that coal to meet our requirements must be definitely and positively non-caking and non-agglutinating.

Therefore, we buy Arkansas anthracite coal instead of other available coal because it has the definite principal characteristics of anthracite coal in that it is hard and compact, will not ignite readily, and burns without coke.

Anthracite contains the highest proportion of carbon of all classes of coal and is void of hydrocarbons that prevail in bituminous coal.

There are classes of bituminous coal that do not cake together, but all classes burn with a smoky flame, which makes it unsuitable for our use, inasmuch as this type of coal completely melts and becomes amorphous; also the bubbles of gas as they escape, after puffing up the furnace

charge, leaves hollow spaces on the grates, causing an uneven distribution of air through the whole mass.

We trust that this information will be of value in obtaining what we desire.

[fol. 27] Yours very truly, The Ozark Smelting and Mining Company, (Signed) W. E. Corts."

I will offer that in evidence as Exhibit A.

Examiner Newcomb: So admitted.

(The letter dated August 28, 1937, was marked "Gregory Exhibit 1," and was received in evidence.)

By Mr. Denman:

Q. Mr. Gregory, have you the letter of which this is the reply in the possession of the company?

A. No, sir, we haven't a copy of the letter here.

By Mr. Howard:

Q. You have it in your office at Chicago?

A. Yes, sir, we have it in Chicago.

By Mr. Denman:

Q. Was that letter written for the purpose of obtaining this statement to introduce here today?

A. We had some correspondence with Mr. Corts and I talked to him on the telephone a couple of times about selling him the coal. I wanted to know if we could be assured of a market for the coal and why he would not buy anything but Arkansas coal.

Q. This reply here is dated August 28, 1937.

A. That is right.

Q. Was that letter received after you had filed your petition [fol. 28] here?

A. No, sir. It was received before we filed the petition.

Mr. Denman: What was the date of the petition?

Mr. Howard: The petition was filed August 31st.

Examiner Newcomb: Let the record show that the Examiner wants to afford everyone an opportunity to present whatever evidence and exhibits at this hearing that are necessary; that this opportunity is afforded everyone.

Mr. Waldron: Mr. Examiner, have you admitted this exhibit in evidence?

Examiner Newcomb: I have.

Mr. Waldron: I desire to have the record show that this is secondary evidence, not the best evidence, and that we, the members of the legal staff, have not had an opportunity to cross-examine the gentleman who signed the document, and that it is incompetent, irrelevant, and immaterial.

Examiner Newcomb: It will be admitted over the objection of the legal department. The Examiner again repeats that he wishes to afford everyone an opportunity to testify and present such exhibits as they feel necessary and pertinent to the issues in this case. I am not going to hold every- [fol. 29] one to the strictest adherence to court procedure. We are a fact finding body. We are seeking information regardless of from what side it may be. The Examiner and the Commission want to remain in an impartial capacity and desire to afford an equal opportunity and not an unequal opportunity to anyone. Therefore, the Examiner is not going to adhere strictly to the rules of evidence. The benefit will be derived by all interested parties equally by this procedure. You may proceed.

By Mr. Howard:

Q. I will show you, Mr. Gregory, what purports to be a photostatic copy of a purchase order of the War Department. I will ask you if that is a photostatic copy of an original received by the Binkley Coal Company.

A. It is. The original of that is on file in the docket.

Q. Together with a photostat copy of schedule of requirements by the Quarter master of the Army at Fort Snelling, Minnesota, marked "Exhibit B."

A. It is.

Mr. Howard, Now, if the Examiner please, I desire to offer these copies in evidence, and I will read just certain portions of the printed matter in these forms which pertain to the subject under discussion.

Examiner Newcomb: Proceed, Mr. Howard.

[fol. 30] Mr. Howard: This is a purchase order from the War Department, dated July 9, 1935. Chicago Quartermaster Depot, 1819 West Pershing Road, Chicago, Illinois, To Binkley Coal Company, 230 North Michigan Avenue, Chicago, Illinois. Ship to Quartermaster, Fort Snelling, Minnesota. 2,781 net tons of coal, hard structure, Arkansas anthracite, egg, 5 by 2, listed as item No. 1-1/2. And then

item No. 1-1/2, still a part of Exhibit B, showing the schedule requirements as follows: "No award under this schedule will be made for Arkansas anthracite coal showing an analysis representing a quality lower than the following: Moisture, 2% as received; volatile matter dry coal, 10% maximum; ash dry coal, 8% maximum; B. T. U. dry coal, 14,000 per pound minimum. Then later on the name of the mine or colliery; Sunshine. Location: Spadra, Johnson County, Arkansas."

By Mr. Howard:

Q. I will ask you, Mr. Gregory, if the coal which is ordered under that purchase order was shipped to the War Department and received by them under the order itself?

A. It was.

Mr. Howard: I offer this in evidence then as Exhibit B. [fol. 31] Examiner Newcomb: So admitted.

(Purchase order of the War Department, July 9, 1935, was marked "Gregory Exhibit 2," and was received in evidence.)

Mr. Howard: I will offer in evidence, Mr. Examiner, and for the purpose of saving time, a similar exhibit marked Exhibit C, from the Quartermaster at Scott Field, Illinois, Quartermaster of the Army, showing shipment of Spadra, Johnson County, Arkansas, anthracite, under order of Arkansas anthracite coal.

(Purchase order for Quartermaster, Scott Field, Illinois, was marked for identification as "Gregory Exhibit 3.")

By Mr. Howard:

Q. I will ask you if that is a photostat copy of the original received by the Binkley Coal Company?

A. Yes sir.

Mr. Howard: In all these exhibits, Mr. Examiner, the original is on file with the Commission.

Mr. Waldron: Will you read the specifications on that?

Mr. Howard: Just exactly the same as under Exhibit B. Moisture as received, 2% maximum; volatile matter dry coal, 10% maximum; ash dry coal, 8% maximum; B. T. U. dry coal, 14,000 per pound minimum.

[fol. 32] Examiner Newcomb: So admitted.

("Gregory Exhibit 3" was received in evidence.)

By Mr. Howard:

Q. The shipments under Exhibit C at Fort Scott were shipped and accepted by the Government under the order?

A. That is right.

Q. I will show you Petitioner's Exhibit D, which purports to be a circular price list of the Southern Coal Company, dated June 1929, and ask you if that is a photostat copy of the original which is on file with the Commission.

A. It is.

(Circular price list of Southern Coal Company, dated June 1929, was marked for identification as "Gregory Exhibit 4.")

Mr. Howard: Again, Mr. Examiner, I will read just certain portions of this. It is a circular price list of coals sold by the Southern Coal Company under date of June 1929, showing "Spad-Ark anthracite"—

By Mr. Howard:

Q. I will ask you, Mr. Gregory, if the words "Spad-Ark"—what do they mean in the trade?

A. That is just an indication that the coal has always been sold as anthracite coal.

[fol. 33] What does "Spad" mean?

A. "Spad-Ark is Spadra-Arkansas. The "Ark" is an abbreviation for Arkansas. It is Spadra-Arkansas anthracite. That is what it is intended to convey.

Mr. Howard: I offer this in evidence as Petitioner's Exhibit D.

Examiner Newcomb: So admitted.

("Gregory Exhibit 4" was received in evidence.)

By Mr. Howard:

Q. Petitioner's Exhibit E, purporting to be an advertisement of the Sunshine Anthracite Coal and also an advertisement by the Wiedenmann-Simpson Coal Company of Kansas City, Missouri—I will ask you if that is a photostat copy of the originals on file with the Commission?

A. It is.

Mr. Waldron: Is this advertisement being offered in evidence at this time?

Mr. Howard: Yes, sir.

Mr. Waldron: We object to its admission. We object to the introduction of the advertisement in the record until it appears in the record whether or not this is anthracite coal. The sales talk may be anything for the purpose of selling coal. This is a mere advertisement. We object to [fol. 34] its introduction as secondary evidence and has no basis of fact behind it.

Mr. Howard: If the Examiner please, the petitioner's opening statement states that this coal has been sold to and accepted by the trade as Arkansas anthracite coal. We are endeavoring by these exhibits to show that the trade by different methods has shown that it has picked and accepted these as Arkansas anthracite coals.

Examiner Newcomb: So admitted.

(Photostat copies of advertisements were marked "Gregory Exhibit 5," and were received in evidence.)

Examiner Newcomb: So admitted.

Mr. Howard: (Reading) "Here is why Sunshine anthracite coal gives you more heating satisfaction for your money." I will not read the values of the coal, if the Examiner please, but I will read this. (Reading) "Telephone us your order today. Wiedenmann-Simpson Coal Company. Now \$9.95 per ton cash. Formerly \$10.75. Hand picked grate size for furnaces. If you have wanted to burn a trouble-free long-burning anthracite, here's your opportunity at semi-anthracite price."

Mr. Machugh: May I suggest, Mr. Examiner, that Mr. Howard state that he is reading from Exhibit E. Is that correct?

Mr. Howard: Yes, sir.

Mr. Machugh: I don't know whether the record shows [fol. 35] that or not.

Mr. Howard: I will be very happy to have the record show that, that it was read from Exhibit E. I shall, therefore, offer Exhibit E in evidence.

Examiner Newcomb: So admitted.

(The advertisement referred to as "Exhibit E" was marked for identification as "Gregory Exhibit 5," and was received in evidence.)

By Mr. Howard:

Q. Mr. Gregory, I show you Petitioner's Exhibit F and ask you if that is a photostat copy of an original on file with the Commission?

A. It is.

Mr. Howard: This purports to be a circular of coal prices from the Pittsburgh & Midway Coal Company, under date of November 1935, in which they state, reading from Exhibit F, "The largest producers and shippers of choice Mid-Continent coal. Bituminous. Refined Sunflower, P. & M. Cherokee, Henryetta, Warden Pullen & Starr, McAlester 'Julian.' Semi-anthracite. Charleston Smokeless, Royal Smokeless, Paris, New Union, Smokeless. Anthracite. Sunshine-Arkansas." Under Arkansas: "Sunshine Anthracite. This choice Arkansas anthracite is produced from the old original, genuine Spadra seam, and is given a perfect preparation in the newest and most modern cleaning plant in the anthracite field." I offer that in evidence as [fol. 36] Exhibit F.

Examiner Newcomb: So admitted.

(The advertisement of the Pittsburgh & Midway Coal Company under date of November 1935 was marked for identification as "Gregory Exhibit 6," and was received in evidence.)

By Mr. Howard:

Q. Petitioner's Exhibit G, Mr. Gregory, I will ask you if that is a photostatic copy of an original on file with the Commission?

A. Yes, it is.

Mr. Howard: Purporting to be copy of an advertisement by the Binkley Coal Company, in which they recite "Arkansas: Sunshine-Anthracite. The hardest, purest, best prepared anthracite coal mined in Arkansas." I offer that in evidence.

Mr. Riddle: We object to all these advertisements and move to strike them from the record.

Examiner Newcomb: Overruled. So admitted.

(Advertisement of the Binkley Coal Company, referred to as Exhibit G, was marked for identification as "Gregory Exhibit 7", and was received in evidence.)

By Mr. Howard:

Q. I show you Petitioner's Exhibit H, and ask you if that is a photostat copy of an original on file with Commission? [fol. 37] A. It is.

Mr. Howard: This is a circular advertisement of the Republic Coal & Coke Company, with offices in Chicago, Minneapolis, St. Louis, and some other points. Reading from the exhibit: "Lehigh Valley Anthracite. 'The coal that satisfies.' The Lehigh Valley Anthracite dock at Superior (all under cover) is the only exclusive anthracite dock at the head of the lakes. Naturally in buying Lehigh Valley Anthracite from this dock you get better sizing, preparation and dry coal at all times, in addition the best anthracite produced. Lehigh Valley is long-burning, clean and dustless. It is easy to handle and a favorite with consumers. Makes your selling quicker and easier."

By Mr. Howard:

Q. Mr. Gregory, I will ask you where the Lehigh Valley Anthracite is produced?

A. In Pennsylvania.

Mr. Howard: Subsequently, in the same exhibit, I read from it, "Arkansas anthracite. Deep shaft mined at Spadra." I offer that in evidence, Mr. Examiner.

Examiner Newcomb: So admitted.

Mr. Riddle: To which exhibit we object or the reason it is a part of the advertisements, and does not prove or [fol. 38] tend to prove anything in issue in this application.

Examiner Newcomb: Overruled.

(The advertisement referred to as Exhibit H, was marked for identification as "Gregory Exhibit 8," and was received in evidence.)

By Mr. Howard:

Q. Mr. Gregory, I show you "Petitioner's Exhibit I" and ask you if that is a photostat copy of an original on file with the Commission?

A. It is.

Mr. Howard: This is an advertisement of the Binkley Coal Company, which I quote from. (Reading) "Big sav-

ing in freight to you because of Briqueting in transit. Standard Briquets; a blended anthracite."

By Mr. Howard:

Q. Mr. Gregory, I will ask you what those Briquets are made from.

A. We had to make them out of about 70 per cent anthracite because of the non-agglutinating quality of the coal.

Q. And where did that anthracite coal come from?

A. Spadra.

Examiner Newcomb: So admitted. Let the record show that the General Solicitor's Office is objecting to all these exhibits of advertisements.

[fol. 39] Mr. Riddle: The same objection to each one.

Examinee Newcomb: Mr. Riddle, the record will so show that you are objecting to all of these advertisements, and let the record show the same ruling by the Examiner.

(The advertisement of the Binkley Coal Company, referred to as Exhibit I, was marked for identification as "Binkley's Exhibit 9," and was received in evidence.)

By Mr. Howard:

Q. Mr. Gregory, I show you a photostatic copy of an advertisement of the Co-op Coal Association, and ask you if that is a photostat copy of an original on file with the Commission?

A. It is.

Mr. Howard: I offer in evidence Petitioner's Exhibit J, purporting to be circular price list of the Co-op Coal Association, price list effective November 5, 1935.

Examiner Newcomb: So admitted.

Mr. Howard: Reading from that. (Reading) "King Co-op Arkansas Anthracite," followed by prices.

Examiner Newcomb: So admitted.

(Price list of Co-op Coal Association, referred to as Exhibit J, was marked for identification as "Gregory Exhibit 10," and was received in evidence.)

By Mr. Howard:

Q. Petitioner's Exhibit K, Mr. Gregory, I will ask you [fol. 40] to state if that is a photostatic copy of the original on file with the Commission?

A. Yes, sir, the same thing.

Mr. Howard: Purporting to be a circular price list of the Hickman, Williams & Company, coal and coke sales agent for Ford Motor Company. I quote from that exhibit: "Blue blaze Arkansas anthracite," followed by prices and quotations, under date of July 27, 1937.

Examiner Newcomb: So admitted.

(Circular price list of July 27, 1937, referred to as "Exhibit K," was marked for identification as "Gregory Exhibit 11," and was received in evidence.)

By Mr. Howard:

Q. Petitioner's Exhibit L, purporting to be a photostat copy of a Department of Commerce news release, Bureau of Census, Washington; I will ask you, Mr. Gregory, if that is a photostat copy of an original on file with the Commission?

A. It is.

Mr. Howard: Quoting from this: "For use in morning papers, July 23, 1937. Department of Commerce, Bureau of the Census, Washington. Census of business: 1935—in cooperation with the Bureau of Mines. Bituminous Coal Mining in the United States in 1935." Then quoting from page 2. The first page consists of a series of figures on the [fol. 41] bituminous coal industry. Then on page 2, I quote: "These figures include mines producing 2,750,179 tons of lignite in the Dakotas, Texas and Montana and mines producing 423,090 tons of anthracite and semi-anthracite in Arkansas, Colorado, Virginia and New Mexico, which are grouped for statistical convenience with the bituminous coal industry." I offer it in evidence.

Examiner Newcomb: So admitted.

(Photostatic copy of Department of Commerce news release of June 23, 1937, referred to as "Exhibit L," was marked for identification as "Gregory Exhibit 12," and was received in evidence.)

Mr. Machugh: Mr. Examiner may I ask either the Examiner or Mr. Howard when Exhibits A to L were filed with the Commission?

Mr. Howard: They were filed under date of August 31, 1937. That was the date they were typewritten; they were not filed until about the middle of September, I believe, Mr. Machugh.

Mr. Machugh: Were they all filed at the same time?

Mr. Howard: They were all filed, the originals and copies, with the Commission at that time.

Mr. Machugh: May I ask that the record show that in so far as the speaker is concerned I have not seen any of these exhibits prior to this time. If they were transmitted to the [fol. 42] office of Consumers' Counsel, neither the exhibits nor the petition were brought to my attention, and I desire to examine them at sometime during the recess.

Mr. Howard: That is perfectly all right.

Examiner Newcomb: Do you know that copies were sent to Consumers' Counsel as provided by the order of the Commission?

Mr. Howard: I do not know that they were. As I read the Commission's order, on the filing of petitions, there was nothing said in that order with reference to filing a copy with Consumers' Counsel. I may be wrong about that.

By Mr. Howard:

Q. I will ask you, Mr. Gregory,—possibly I have covered this before but I want to cover it in a general question—under what designation has the coal from the Spadra field in Arkansas been sold to the trade during the life or during your knowledge of the field?

A. Arkansas anthracite.

Q. Has it ever been sold as anything else to your knowledge?

A. No.

Mr. Howard: I think that is all for this witness, Mr. Examiner.

Examiner Newcomb: Does the General Solicitor's Office [fol. 43] have any questions?

Mr. Riddle: Yes, sir.

Examiner Newcomb: You may proceed, Mr. Riddle.

Cross-examination.

By Mr. Riddle:

Q. Mr. Gregory, the advertisements that have been introduced in evidence here were prepared, written, published, and paid for by the Binkley Coal Company? Isn't that correct?

A. No, sir, absolutely not; had nothing whatever to do with it.

Q. Who paid for it?

A. There is a list of them there. They are various companies that we have no connection with at all and never have had.

Q. Then you had no connection with these advertisements whatever?

A. Some of them we did. The Binkley Coal Company advertisements; I think there was one there.

Q. Whatever is said in them—

A. (Interrupting.) Is just the trend of the trade.

Q. (Continuing.) —is hearsay, third party speaking, so far as the Binkley Coal Company is concerned?

Mr. Howard: Mr. Examiner; I do not know whether the witness is qualified as a legal expert to determine whether [fol. 44] it is hearsay or not.

Mr. Riddle: He says he knows nothing about them.

A. I say that we did not have anything to do with the printing of them or the payment. They are submitted as evidence of the fact that the coal was sold not only by us but by everybody else as Arkansas anthracite coal for years.

By Mr. Riddle:

Q. You had nothing to do whatever with the writing or paying for or publishing?

A. No, sir. I think with the exception of what is shown in that circular itself.

Q. You are in charge of the sales agency?

A. Yes, sir.

Q. Do you mean to tell this Commission that you have not sponsored any advertisements of the coal that you are selling?

A. Oh, yes, we have sponsored some and some of those exhibits have our name on them.

Q. Yes.

A. One or perhaps two of them out of the whole bunch.

Q. You say your company did not write that one?

A. Certainly. I am saying we did and paid for them, but we did not write all of them.

[fol. 45] Q. Now, in Exhibit B (Gregory Exhibit 2), which you have introduced in evidence, I will ask you if you did not have a contract with the Government in 1935 for the shipment to Fort Snelling, Minnesota, of a certain lot of coal mentioned in that exhibit?

A. I think so.

Q. And, I will ask you if the specifications did not require a volatile content of 10 per cent?

A. I do not know without looking at the specifications. You have them there, have you not?

Q. You do not know whether that was a requirement of the Government?

A. I don't know offhand without looking at that.

Q. The volatile content had to be 10 per cent?

A. I don't know.

Q. Did you have anything to do with making that contract?

A. We make lots of bids on Government contracts on all kinds of coal.

Q. You would have to bid according to specifications, would you not?

A. Yes, sir, we would.

Q. I will ask you if the Government did not refuse quite a portion of this shipment and order the coal removed from their premises?

A. They did not. They paid for the coal.

[fol. 46] Q. I will ask you if they did not pay for it at a reduced price?

A. They did not.

Q. I will ask you if you did not have a controversy—

A. (Interrupting.) We did.

Q. (Continuing.)—with the Government and that they claimed that your coal did not come up to the specifications at all?

A. That is absolutely right, in structure but not in volatile content or anything else pertaining to this case. They took the coal and paid for it and kept it and burned up about half of it and then along in the middle of the season said there was too much slack in it. The local officers wanted us to take it back, which we refused to do, naturally. The War Department ruled that there was no reason why we should take it back and they paid for the coal.

Q. What do you mean by "structure"?

A. The hardness of the coal.

Q. Did you have any trouble on any of these other orders?

A. No, sir.

Q. This was the only one?

A. That is the only one I recall.

Q. Are you acquainted with this Spadra field where you [fol. 47] sell the entire output of the Sunshine Anthracite Coal Company?

A. Yes, to some extent.

Q. Are there mines north and south and east and west of it?

A. Yes, sir.

Q. Mining the same seam?

A. Yes, sir.

Q. Do you buy those coals?

A. Some of them.

Q. What mines do you buy from other than the Sunshine?

A. Oh, we have bought a number of coals in there. I do not have a list of them here, but we have bought coal from several mines around there at different times.

Q. Do you know of any other mines in that field that are claiming that they are mining anthracite coal?

A. Yes, sir. They have all been claiming that they were mining anthracite coal up until the past few weeks.

Q. Who are those? Name them, please.

A. The McAlester Fuel Company, Collier-Dunlap Coal Company, Diamond Anthracite Coal Company. Several of them around the room here. They have all sold Arkansas anthracite coal.

Q. Now, I believe the statement was made that this mine [fol. 48] was not operating. Is that correct?

A. It was not operating this summer. It was shut down last spring to revamp the mine. It is operating now.

Q. When did you begin operations?

A. Oh, they began loading a little coal last week.

Q. Last week?

A. Yes, sir.

Q. That was the first?

A. That is the first for several weeks, yes.

Q. I don't remember whether it was you or your counsel that said that the mine was not now in operation?

A. He made the statement and gave figures showing the production up to some date last spring and then said the mine at that time shut down, which is true.

Q. I suppose you had to have anthracite to make Briquets. Is that universally true?

A. It is in our case. We have the only Briquet plant up there that I know of. We have not been able to sell Briquets successfully made out of straight smokeless slack.

Q. Don't you know as a matter of fact that in the lignite field, they make Briquets out of lignite?

A. Yes, sir.

Q. They don't have to have any anthracite to mix with it, do they?

[fol. 49] A. No, sir. You can make Briquets out of anything but not the kind we are making.

Mr. Riddle: If the Examiner please, Mr. Puterbaugh wants to ask some questions.

Examiner Newcomb: Proceed, Mr. Puterbaugh.

By Mr. Puterbaugh:

Q. Mr. Gregory, do you know about the number of mines that are in the Spadra field?

A. I know how many are operating; yes.

Q. About how many?

A. There are about seven or eight left; aren't there?

Q. Is it your opinion that your coal is different in quality from the other coals that are being mined?

A. Not particularly.

Q. Isn't it a fact that all of the coals have practically the same analyses?

A. Naturally, yes, sir.

Q. And if it is proper for your slope to be exempted, the product of your slope, it would be equally proper for all mines in the Spadra field to be exempted from the application of the Bituminous Coal Act?

A. I do not see why not.

Q. You are claiming that your coal is anthracite, is that right?

[fol. 50] A. We are claiming under the most strict regulations that it is not less than semi-anthracite. In either event it is outside the classification set up in the Guffey-Vinson Coal Act.

Q. What is your distinguishing definition as between anthracite and semi-anthracite?

A. The carbon content principally.

Q. Will you tell us what the requirements are?

A. The formula used there is here some place. I think it is in the docket. The Parr formula. The exact percentage

of carbon necessary, the minimum percentage. You have it there, have you not?

Mr. Howard: We set that up in our original petition, Mr. Examiner.

(A discussion was had off the record.)

By Mr. Puterbaugh:

Q. Now, are you ready to give your answer?

A. Yes. Do you want these repeated?

Q. Yes. We did not have a copy of your application and we would like to know what your contention is as to what anthracite coal is.

A. Page 68 of the bulletin published in September 1934 by Committee D-5 on coal collected—

Q. Pardon me, Mr. Gregory, but I could not catch what you were reading from.

[fol. 51] A. From the bulletin published in September 1934 by Committee D-5 on coal collected. That is a committee of the American Society for Testing Materials, classification of coal by rank.

Mr. Howard: Mr. Puterbaugh, this is part of our petition. It is all in there.

Mr. Puterbaugh: It will not take but a moment to read it and then we will know what we are talking about.

A. Class 1, anthracite, group 3, semi-anthracite, specifies the limits of fixed carbon 6r B.T.U. mineral matter free basis, dry fixed carbon, 86% or more and less than 92%, dry volatile matter 14% or less and more than 8%, with requisite physical properties, nonagglutinating.

By Mr. Puterbaugh:

Q. Now, is that your definition of the requirements for anthracite?

A. Semi-anthracite.

Q. Semi-anthracite?

A. Yes, sir.

Q. As I understand it, you are contending that your coal is anthracite.

A. We are contending that it is semi-anthracite or higher.

Q. You are contending also that it is semi-anthracite and that it does not come under the Bituminous Coal Act?

[fol. 52] A. Yes, sir. _____

Q. Will you give us the analysis of your coal?

A. It is given in all these Government analyses. The Government analyses are shown.

Q. I haven't that available.

A. They are all in there.

Q. In your petition, you mean?

A. Yes, sir.

Q. Would you mind giving us your analysis, what your analysis of your coal is? We are still without that petition and I want to get what your analysis of your coal is.

A. Here is the Bureau of Mines analysis, September 23, 1935.

Q. Is this the Sunshine Coal?

A. Yes, sir.

Q. September 23, 1935?

A. Yes, sir. That is this Fort Snelling coal you were talking about. A total of 1,834.35 tons, 5 x 2 inch Sunshine egg, Fort Snelling, volatile matter 12.9, fixed carbon 87.1, B.T.U. 15,633.

Q. Is that dry coal?

A. Yes, sir.

Q. As mined?

A. Yes. That is the same basis as the Committee specification [fol. 53] cations. They specify a minimum of 68% dry. This shows 87.1.

Q. Of course, this coal was shipped up to Fort Snelling and would have had a chance to evaporate its moisture and some of its volatile?

A. Very little. There is very little moisture in it. The moisture is less than 2% when it is mined.

Q. You agree that coal in that field down there is all from the same seam of coal?

A. Yes, generally in that district. Yes.

Q. What is the name of that seam of coal?

A. Spadra.

Q. Geologically? You understand it is the Hartshorne seam of coal, do you not?

A. Yes, sir, Spadra district.

Q. Do you know that that is the same seam of coal that is mined in Denning, Jenny Lind, and at Hartford in the western Arkansas mines?

A. No, I do not.

Q. You know it to be a fact, don't you, that this coal and the smokeless are similar in structure and appearance, do you not?

A. No, it is not.

Q. Didn't you say you have handled this coal for a long while?

A. Yes, sir. That is the way I learned that. There are [fol. 54] some coals similar to it in appearance, but there is not any other coal in the same classification.

Q. They are all more or less friable and granular in structure?

A. Yes, sir.

Q. And similar to that extent?

A. No, sir. This coal is harder than the soft smokeless coal.

Q. Slightly harder?

A. Yes, sir.

Examiner Newcomb: Any further questions of this witness, Mr. Puterbaugh?

Mr. Puterbaugh: No, sir.

Examiner Newcomb: Mr. Waldron, do you have some questions you desire to ask?

Mr. Riddle: If the Examiner please, I want to ask the witness some questions.

Examiner Newcomb: Proceed, Mr. Riddle.

By Mr. Riddle:

Q. I hand you a piece of coal, Mr. Gregory, I will lay it before you. I wish you would tell me what coal that is.

A. It is not Arkansas anthracite.

Q. It is not?

A. No. That is my guess. It might have been picked off [fol. 55] the outcrop or some place.

Q. Now, this coal in appearance, does this have any of the appearance at all of the Spadra field coal?

A. Yes, some. It is black and it is coal.

Q. It crumbles and breaks off?

A. It crumbles a good deal more than good Spadra coal will.

Q. You get it all over your hands, you blacken your hands when you touch one of them, don't you? And if that is from the Spadra field you do not think that is from your coal?

A. No, sir.

Q. Can you give any reason why this is not your coal?

A. No, sir. That might have been picked off an outcrop. I cannot tell anything about one piece of coal.

Examiner Newcomb: Are you introducing that lump of coal as an exhibit?

Mr. Riddle: I am. Mr. Plein desires to ask the witness a question.

Examiner Newcomb: Mr. Plein is with the Commission. Let the record show that Mr. Riddle is asking these questions, but Mr. Plein can put them to the witness to save time.

By Mr. Riddle:

[fol. 56] Q. In reference to this contract which you have at Fort Snelling. It called for, as I recollect, 8% ash and 10% volatile matter minimum?

A. Yes.

Q. And 14,000 B. T. U. It was brought out that there was some controversy with the Quartermaster Corps in regard to the acceptance of that coal.

A. Not in regard to the acceptance. They accepted the coal. The controversy came several months after it was accepted.

Q. On the payment?

A. No. They paid for it. The controversy came when they found that the coal had slacked in handling it.

Q. Did you have occasion to go to Fort Snelling and discuss this matter with the people there?

A. Not personally, no, sir.

Q. What is that?

A. Not personally.

Q. You sent some one?

A. Yes, sir.

Q. Can you tell us what their reaction was to this? What I am trying to get from you, you mentioned before something about the controversy arising over the structure of the coal. Can you explain that a little more fully? In what way the Quartermaster Corps objected to the structure of [fol. 57] the coal?

A. There was too much slack in the coal. I explained that awhile ago. They unloaded the coal up there with clam-

shells, put it on the ground. Then they picked it up with clamshells and put it in trucks. Then they hauled it over to the quarters and shoveled it into the basement, and the coal simply won't stand that handling.

Q. It received a lot of handling then. As I understand it, it was 5 x 2 inch egg?

A. That is right.

Q. It was loaded into open cars and shipped to Fort Snelling?

A. Yes.

Q. And there it is unloaded by clamshells on to the ground?

A. That is right.

Q. And then reloaded into wagons and delivered to the quarters?

A. That is right.

Q. Do you think Pennsylvania anthracite will stand that same handling?

A. No, I do not.

Q. It will stand it better, won't it?

A. Yes. It is a little harder than the Arkansas anthra- [fol. 58] cite.

Q. Are you familiar with so-called Virginia anthracite?

A. No, I am not.

Q. Or Colorado or New Mexico?

A. No. I have never had any personal experience with it. I have seen that and heard of it.

Q. You are familiar with West Virginia semibituminous?

A. Yes, sir.

Q. That, of course, would not stand the handling at all?

A. No, sir.

Q. In reference to this A. S. T. M. specification that you mentioned on page 68, that came out of a book of this kind? I want this to be sure I am talking about the same thing that you are.

Mr. Machugh: May I suggest that you read the title of the book.

Mr. Riddle: It is the same one, classification of coals by rank. A. S. T. M. designation 388-34T.

Mr. Waldron: Mr. Plein was reading from A. S. T. M. standards on coal and coke, prepared by Committee D-5 on coal and coke, published by the American Society for Testing Materials, Philadelphia, Pennsylvania.

[fol. 59] By Mr. Riddle:

Q. Is that the same one?

A. It is probably the same one or something like it.

Mr. Howard: I think that is it.

By Mr. Riddle:

Q. I wanted to be sure that that was the same one. Do you know whether the A. S. T. M. has issued any later specifications than this?

A. Not that I know of.

Q. To your knowledge, this is the latest specification?

A. I don't know whether they have or not. That is the only one I know of. It is the latest one I know of.

Q. I think in Exhibit K you mentioned that the Bureau of Census and the Bureau of Mines in its report mentioned the hard coals, I think they call them, outside of Pennsylvania, and gave figures and specifications on lignite and anthracite outside of Pennsylvania. That was your Exhibit K?

A. Yes.

Q. Do you know upon what basis the Bureau of Census or Bureau of Mines arrived at this separation of anthracite and semi-anthracite outside of Pennsylvania?

A. My understanding is that they were reporting on all [fol. 60] of the fields and that the production in some of the other fields was so small that they just grouped them together.

Q. You are referring to the grouping of Colorado, New Mexico, and Arkansas?

A. Yes, sir.

Q. How did they arrive at this production that they give? How did they arrive at the determination that that was anthracite or semi-anthracite coal? Do you know that?

A. No, I do not. I have not looked it up. Probably by this same formula.

Q. If they used that same formula they would have needed an analyses on every mine?

A. Yes, sir.

Q. To couple up with the production to make the separation?

A. I don't know how they arrived at those figures or where they got their information.

Q. This coal that is used by the Ozark Smelting & Mining Company, is there any specification in the coal they

need for their metallurgical purposes other than it be low in volatile matter? Does the sulphur content have anything to do with it?

A. No, I do not think so. The principal thing is that it shall be non-agglutinating. They cannot use a coal or coke that sticks together. It is all described in the letter there. [fol. 61] Q. Is it used in connection with the production of zinc oxide?

A. Yes, sir.

Q. If it was high in sulphur, that would be an objection also?

A. No, sir, not necessarily. The Spadra coal is very high in sulphur. The coal is higher in sulphur than other available coals.

Q. Do you know the representative analyses on the slack size for this Spadra anthracite?

A. It varies. There are all kinds of samples and analyses. I mentioned 3%.

Q. 3% sulphur?

A. At least.

Q. That is pretty high.

A. Yes. They can buy coal for a dollar a ton less with much less sulphur in it and as good B. T. U. content.

Q. One of these analyses that is mentioned here I believe was collected at Fort Snelling?

A. The sample was collected at Fort Snelling.

Q. The sample was collected at Fort Snelling by some of the Quartermaster Corps?

A. Yes, sir.

Q. You do not know by whom?

[fol. 62] A. No, sir.

Q. You don't know whether it was based on Bureau of Mines standards set up in technical paper No. 133?

A. Supposedly they are samples taken and analyses made under the specifications of the Bureau of Mines, whatever they are.

Q. Do you have any analyses based upon samples taken in the mine?

A. No, sir, I have not.

Mr. Riddle: That is all.

Examiner Newcomb: Does Consumers' Counsel have any questions?

Mr. Machugh: If you please, Mr. Examiner.

By Mr. Machugh:

Q. Mr. Gregory, am I correct in my understanding that you contend that your coal is semi-anthracite or higher and does not come under the provisions of the Bituminous Coal Act of 1937?

A. That is true, yes, sir.

Q. Will you explain what you mean by "higher"?

A. The formula that they generally use based on the minimum carbon content of the coal. The coal has been sold and established and known as Arkansas anthracite all over the middle west. It is possible that that is technically wrong, according to some formulas. It might be a semi-anthracite. So we are basing our contention that it is at least a semi-anthracite because that is also exempt.

Q. Whatever kind of coal would it be if it were not semi-anthracite?

A. It would have to be either anthracite or semi-anthracite.

Q. That is the answer I wanted. For whom are you speaking when you say "your coal"?

A. I am Vice President of the Binkley Coal Company. We are general sales agents for the Sunshine Coal Company and interested in the operation of the mine.

Q. What is the tonnage of the company you are representing in this protest you are making at the present time?

A. It is very small. It is practically nothing now. We hope to get it up to about 300 tons a day.

Q. What would it be on an annual basis?

A. That is only an estimate.

Q. What is the best estimate you can give at this time?

A. I should say if everything is favorable we ought to get 50,000 tons a year or better.

Q. What do you mean by saying "if everything is favorable"?

fol. 64] A. I mean if we are able to sell the coal and if we do not have any floods and if operating conditions are satisfactory and so forth.

Q. Where is that coal produced?

A. In Johnson County, Arkansas, near Clarksville and near Spadra.

Q. All of it is mined there?

A. Yes sir.

Q. And where is this coal sold?

A. We intend to sell it principally in Minnesota. There isn't much market for it south of Sioux City.

Q. How much of the tonnage would be sold outside of Arkansas where it is mined?

A. Practically all of it. We do not intend to sell any of it south of Omaha except the screenings, of course, that we do not use ourselves.

Q. I believe you stated that there were seven or eight other mines located in the same Spadra field?

A. Yes.

Q. And that, in your opinion, that coal would be similar to your own coal?

A. Yes. Yes, all the companies that are working the same seams, and the same conditions we are should have the same classification.

Q. But you are speaking only for your own coal and not [fol. 65] for the others?

A. No, I am not asking for any exemption for the others. That is their business.

Q. If you do receive an exemption what in your opinion will be the effect upon the consumers of this coal?

A. I do not think it will have much effect except that we will be putting a lot of the coal into the northwest, where they can probably, if the Pocahontas prices continue to increase, I think probably the consumers in the northwest will be able to buy this coal and heat their homes for less money.

Q. For less money than what?

A. Than the West Virginia coal.

Q. What would be the effect upon the consumers if it is not exempt from the provisions of the Bituminous Coal Act?

A. They will have to continue buying the West Virginia coal because they won't buy it at artificially high prices, that is, in any quantity. They will buy some lots for awhile if the mines are able to run.

Q. Is that your only estimate of the effect upon the consumers, or have you talked to the consumers?

A. I have not talked to the consumers. My contact is principally with the retail distributors who in turn do talk [fol. 66] to the consumers, and that is the impression we are investing our money on and doing our work on, is the basis that I have described.

Q. Can you think of any other effect upon the consumer, either beneficial or harmful, as to the granting or denying of this exemption?

A. They cannot be but beneficial, but that about covers it, I think.

Mr. Machugh: Those are all the questions I have just at the moment, Mr. Examiner.

Examiner Newcomb: Mr. Fowler, representing the United Mine Workers of America, do you have any questions?

Mr. Fowler: Yes, if the Examiner please. I am no lawyer.

(A discussion was had off the record.)

By Mr. Fowler:

Q. In February 1936 you visited me at the hospital in Kansas City?

A. Yes, sir.

Q. At that time there was a grievance between the Sunshine Coal Company and the United Mine Workers?

A. Yes, sir.

Q. At that time you did not claim to own those mines?

A. No, sir.

[fol. 67] Q. You did not own them at that time?

A. No, sir. The Binkley Coal Company still does not own them.

Q. Then the coal that you sold was from the Johnson Coal Company or rather the Sunshine Coal Company?

A. Yes, sir.

Q. You were present at the time that that case was heard before the Referee Cartwright from Indiana?

A. Yes, sir.

Q. It was claimed at that time, was it not, that you had to be put on the same basis as the Paris Coal fields?

A. I don't know whether it was or not. I would not be surprised.

Q. Isn't that in the contract?

A. I don't know.

Mr. Howard: If the Examiner please, I do not want to delay this proceeding or be technical in my objections, but if Mr. Fowler wants to put Mr. Gregory on the stand as his witness to prove his case, that is a different situation. Mr. Fowler's line of questioning does not cover the ground on which Mr. Gregory testified and which is the subject of ordinary cross-examination. If he wants to proceed along this theory and wants to put Mr. Gregory on as his witness,

I have no objection to that, but I think that it should come [fol. 68] in its proper place after we have closed our case.

Examiner Newcomb: Mr. Howard, as I said earlier in this proceeding, I am not going to confine this hearing to the strictest rules of evidence. The benefits to this informal proceeding will be beneficial to all parties. Mr. Fowler has a right as an interested party representing the United Mine Workers to question Mr. Gregory on such matters and facts as Mr. Gregory knows of his own personal knowledge.

The Witness: I will be glad to answer any questions.

Mr. Howard: May the record show that this is not cross-examination but is a new line of examination?

Examiner Newcomb: The record may so show.

Mr. Fowler: Mr. Examiner, my only purpose is to prove that they did not call it anthracite at that time.

Examiner Newcomb: You may proceed, Mr. Fowler. You are within your rights.

By Mr. Fowler:

Q. It is true now that the Mine Workers won their case on the basis that it was in competition with the Paris coal and the agreement that was reached at that time, and the Referee decided it was the same class of mining?

A. It is in competition with all coal, Mr. Fowler.

[fol. 69] Examiner Newcomb: Mr. Fowler, will you mind stating for the record what kind of coal the Paris field produces.

Mr. Fowler: It is between semibituminous and semi-anthracite, as I understand. It is semibituminous or semi-anthracite. I don't know what you would call it.

By Mr. Fowler:

Q. In making this agreement, isn't it a fact that all the contracts are based on the selling prices, freight rates, and so forth, and competition?

A. Yes. All fuels are in competition with all other fuels, oil, gas and all kinds of coal.

Q. Your company signed a contract when?

A. You mean a labor contract?

Q. Yes.

A. I do not have any idea. I don't have anything to do with that.

Q. The first contract was signed, for your information,——

A. Not with me.

Q. Was signed just a few months ago

A. Not by me because that is in Mr. Hamilton's hands.

Q. Your mine in the Spadra field has not produced any coal up to date?

A. Yes, sir, they are producing a little coal.

ol. 70] Q. Just developing coal?

A. Yes, sir.

Q. You are mechanizing your mines?

A. Yes, sir.

Q. Isn't it a fact that if you mechanize those mines that the selling price you are asking for it will put all the miners out of the field?

A. No, sir.

Q. It is not?

A. We cannot get enough coal out of that mine to make a profit in this field or any other field.

Q. Now, then, speaking of anthracite. Did you ever load any anthracite coal in Pennsylvania?

A. No, sir.

Q. Do your miners use handleathers in handling that coal?

A. I don't know.

Q. They can load that coal without handleathers, can't they?

A. I don't know. You are asking me about a lot of things I know nothing about.

Examiner Newcomb: Mr. Fowler, we must bear in mind that Mr. Gregory here is the Vice President in charge of the mines. Mr. Howard is the President of the corporation. Do you have some one else who knows something about operations of your mines that we can call?

Mr. Howard: Yes, sir.

The Witness: Mr. Hamilton.

Mr. Fowler: The only point, Mr. Examiner, that I want to bring out, he was very much interested in behalf of the McKinley Coal Company at the time of adjusting this dispute and the argument came up as to what analyses their coal could be placed at, and I was in the hospital at Kansas City when they brought this case up to me. It was adjusted and that is the one thing I wanted to bring out.

Examiner Newcomb: You may question anybody that happens to know, and I believe the company will have wit-

nesses here that can speak on the operations and other information you are attempting to bring out by this witness.

Mr. Fowler: All right.

Examiner Newcomb: Is that all now, Mr. Fowler?

Mr. Fowler: Yes, sir, I am through.

Examiner Newcomb: Are there any further questions?

Mr. Puterbaugh: Yes, if the Examiner please.

Examiner Newcomb: You may proceed, Mr. Puterbaugh.

By Mr. Puterbaugh:

Q. Mr. Gregory, referring to the market conditions of Spadra coal, these eight or ten mines in Johnson County, [fol. 72] is it not a fact to your knowledge that the prices have been badly demoralized, unequal and uneven, from the various producers in that district?

A. Yes, sir. There has never been any particular basis for prices or any price maintenance in that district that I know of.

Q. Is it your opinion that the operations there have been unprofitable for several years?

A. Yes, sir, I think so.

Q. The general belief—

A. (Interrupting.) That is my guess. I don't know anything about the operations, no.

Q. You know as to the operations of the Sunshine Coal Company; have they been profitable? Your company has been interested in that for several years.

A. No, I do not think they have made any money.

Q. Do you think that they have lost money?

A. They have about broken even, I think.

Q. It is the general opinion among the producers in District No. 14 that the fixing of a minimum price under the Bituminous Coal Act would tend to stabilize at some reasonable figure the selling prices of coal from these several districts in Arkansas. Does your company share that opinion or do you feel that—

A. (Interrupting.) I do not believe that that field can ever [fol. 73] live with the present mining method and present prices. I think the prices are exorbitant. I do not feel that the field will ever survive unless they do sell the coal at somewhere near a reasonable price.

Q. And your thought in asking exemption, you want to be able to offer your coal at a lower price than the other nine or ten producers in that county that have accepted the code?

A. There is not any price. There never has been since I have been in there. Our prices may be higher or they may be lower. We simply feel that the coal is definitely without the specifications of this Bill, and rather than just ignore the Bill we have filed this request for exemption. We are interested in approximately twenty-five other coal mines all over the country, in all fields, and every one of them is operating under the Coal Act, but this one does not belong there.

Q. You say there is no price and yet you say the price is too high. What do you mean by those two statements?

A. I mean that generally the list prices down there, which are subject to reductions and discounts and everything else, the list prices are too high to sell the coal against eastern smokeless coal.

Q. But as related to the cost of production and the wages [fol. 74] being paid and the cost of putting the coal in the cars and preparing it, you do not think they are too high from that standpoint, do you?

A. I think the wages are very reasonable. I think that the high cost of production is caused by a lack of running time. You cannot run any mine thirty or sixty days a year and make a profit, I don't care how much you get for the coal.

Q. It is a fact, is it, that your company is now installing what has recently installed the conveyor system of getting the coal out of the mine?

A. Oh, yes. We have the normal machinery for the production of coal, as modern as we can get it.

Q. You have put in a new and so far untried method of producing the coal, is that right?

A. Not at all.

Q. I mean untried so far as the Spadra field is concerned?

A. Yes.

Q. You have not operated it long enough yet to know just what the results will be as to lowering the cost of production?

A. Not in this field.

Mr. Howard: Again, Mr. Examiner, I would like to have his line of examination proceed against some member of [fol. 75] our organization that is familiar with the work. They are traversing Mr. Gregory's territory. He is a salesman and they are getting into operating questions.

The Witness: That is perfectly all right. It does not hurt anything that is pertinent to the case. I would like to sit here and visit all day.

Examiner Newcomb: The Examiner is in accord with your statement, Mr. Howard, and upon recess of this hearing I wish that you would furnish the Examiner and the legal department and the Consumers' Counsel the names of your witnesses that you propose to introduce, their position and what you believe the purpose of their testimony will be.

Mr. Howard: We do not propose to put them on the stand. If the opposition desires to cross-examine them upon operating questions, they may do so.

Mr. Puterbaugh: I have one more question to ask on the operating mechanism and I have one or two more questions on the marketing, and if Mr. Howard won't object I will ask those.

Mr. Howard: Very well.

Mr. Puterbaugh: The point I was attempting to get into the record was this. The point that raised this question as to whether this coal comes under the Bituminous Coal Act or not was undoubtedly a question that arose from the marketing end or the sales department. I gather from Mr. Gregory's answers that he has made it clear that his thought is that his company, having installed a new system of mining which they hope will reduce the cost, will go out into the market and offer the coal at lower prices than it has heretofore been offered at, although he states that it has heretofore been badly demoralized as a field and that there has really been no stable price. The other producers in the field, many of whom are here today, have looked with longing on this Bituminous Coal Commission setting minimum prices that would stabilize that demoralized field for labor and for a fair price. The purpose of these questions is simply to bring out what thought or motive the Sunshine Coal Company had in asking to be exempted from the control of the Bituminous Coal Commission as to the fixing of minimum prices.

By Mr. Puterbaugh:

Q. I will ask you, Mr. Gregory—it has been reported to me—I will ask you if it is correct that your company has stated to coal dealers in Minneapolis and St. Paul that you were expecting to be exempt and that you would contract with them for their season supply of coal at a price around \$4 a ton, substantially lower than the printed circulars that are in effect?

[fol. 77] A. We certainly have stated to anybody that has asked us that we expected to be exempted. We have not made any contracts and fixed prices on the coal simply because we have not had any coal. We might have made them if we had had the coal. We do not know yet what our costs are going to be. We expect them to be low. This untried system which you keep talking about has been working very beautifully for us and for other people in other fields. We feel that if we can get it into this field and have it work the same way that we can bring this back to life. Your Spadra tonnage is slipping all the time. We have no desire to enter into any controversy with anybody down here. We get along with our neighbors every place we operate. We are not going to come out here and destroy your market, if that is what is worrying you, but we don't think that we have a chance of getting the high exorbitant prices that we have got to get following the present mining methods.

Q. Do you feel that the Bituminous Coal Commission would be likely to name a minimum price that would be exorbitant or unjust to the public?

A. I do not feel that the Bituminous Coal Commission would name the price. My feeling is that the other operators who are still using the old mining methods would set up a price and vote down any price proposition that we [fol. 78] should suggest.

Q. Well, it would have to be named hereafter; the price in conformity with the requirements of the Bituminous Coal Act, would it not?

A. Yes, sir.

Q. Based on a weighted average cost?

A. Yes, sir. Well, if that weighted average cost cannot be brought down I do not think we can go out to a field—

Q. (Interrupting) You agree with this, that perhaps the greatest damage to the Spadra field has been the substitution of natural gas and fuel oil with the class of trade that formerly burned Spadra coal?

A. That has damaged every coal down here, but what I am interested in is this eastern coal. There is a market of approximately five million tons of West Virginia smokeless coal in the territory that can be reached by Spadra coal where Spadra enjoys the lower freight rates. If Spadra coal can be sold somewhere around the Pocahontas prices in that territory there is a market for the coal.

Q. Your thought is that the minimum prices which the Bituminous Coal Commission might fix might be too high to permit your company to do that?

A. I feel that I have already explained that.

Mr. Puterbaugh: That is all.

[fol. 79] Mr. Waldron: Mr. Examiner, may I ask Mr. Gregory a question?

Examiner Newcomb: Yes, sir.

By Mr. Waldron:

Q. I would like to have you give me, Mr. Gregory, if you will, please, the total tonnage produced at your mine, either by truck or rail in the last year.

A. Which mine?

Q. The Sunshine.

A. I don't know. They are in the schedules there.

Mr. Howard: It is stated in the petition and was read.

A. 1400 ton, I think. For 1937, 1,886 tons.

By Mr. Waldron:

Q. What months does that represent?

A. January, February and March.

Q. Have you operated since March?

A. No.

Q. You are not operating now?

A. No, just on development. The mine is not running. We get out a little coal but the mine is not in operation.

Q. It is not being operated at the present time and has not been since March, is that correct?

A. That is approximately correct, yes.

[fol. 80] Examiner Newcomb: Does the Marketing Division have any questions?

Mr. Milligan: Yes, if the Examiner please.

Examiner Newcomb: You may proceed, Mr. Milligan.

By Mr. Milligan:

Q. Mr. Gregory, you refer to competition with eastern smokeless at one time and the West Virginia coal at another and Pocahontas at another?

A. Yes, sir.

Q. Is that the coal that the Spadra field comes in competition with?

A. Not on its present price basis, no, sir. It cannot compete with the Pocahontas prices. Pocahontas controls the territory up there practically. You have got a coal here that is not suitable for warm weather. That is generally known. I don't know whether you know it or not but the people that are selling it and burning it every day know that the coal is a slow burning coal, anthracite-type coal, and it is not a good fuel in Fort Smith or Kansas City.

Q. It is the West Virginia Pocahontas coal that you want to compete with on an even basis under this new arrangement?

A. Yes, sir.

Q. These various exhibits purporting to be photostat [fol. 81] copies of advertisements, do they refer to coal from the Spadra field in general or coal from your Sunshine mine?

A. Both.

Q. Both?

A. Yes, sir.

Q. They do not necessarily just mean Sunshine mined coal?

A. No, sir.

Q. Just merely the field of coal?

A. Certain specified coal in the field, yes.

Q. You do not claim any material difference between your Sunshine Spadra and the other Spadra mines surrounding it?

A. Some of them. There is some difference between some coals in any district, generally speaking. We went all over that.

Q. Any company handling the coal from the Spadra field; does not make much difference between the mines?

A. No, sir, not a whole lot.

Mr. Mill-gan: That is all.

By Mr. Machugh:

Q. Mr. Gregory, are you able to state what is the general class or type of consumers to whom this coal in which you are interested is sold?

[fol. 82] A. Well, they are the middle class people who burn coal usually in furnaces or stoves.

Q. Are you able to name two or three typical consumers at this time?

A. I am not. We have no retail business and I am not familiar with the consumers. I have a number of dealers who are in touch with the consumers.

Q. But you don't have the name of any large or representative or small consumers of this coal in which you are interested?

A. No, I do not, not in the domestic coal. It is scattered out. It is sold five or ten tons a year to householders, and I don't know any of them offhand.

Q. Is substantially all of it sold that way, to small consumers?

A. Yes, sir, except the screenings, of course, which are sold to the smelters or to the Briquet plant.

Q. You cannot give me the name of any individual consumers or companies?

A. Well, there are not any companies. They are all householders. I cannot think of any. I can find some if you are interested in them. I will be glad to do so.

Mr. Machugh: Thank you, Mr. Gregory, and you may do so. That is all.

[fol. 83] Redirect examination.

By Mr. Howard:

Q. When you stated this mine was not working or had not worked since March, you did not mean to convey that it was not being developed? There was development work being done?

A. Yes, sir. That was brought out. We have mined coal but not shipped any coal.

Q. You have not produced any coal since March?

A. We have produced a little development coal. The mine has not been abandoned. We have been in there working a long time on machinery.

Q. This coal when used for smelting purposes, it is not used for heat purposes but is used as a flux in the smelting, isn't it?

A. Yes, sir.

Q. And for that purpose it is necessary to have a non-agglutinating coal?

A. That is true.

Q. And the non-agglutinating is one of the chief characteristics and distinctions between the bituminous and the anthracite and semi-anthracite coal, is it not?

A. That is true.

Mr. Howard: That is all.

Examiner Newcomb: Let the record show a recess until two o'clock. It is now 1:00 o'clock.

{fol. 84] (Whereupon, at 1:00 o'clock p. m., a recess was taken until 2:00 o'clock p. m. of the same day.)

Afternoon Session

(The recess having expired, the hearing in the above-entitled matter was reconvened at 2:00 o'clock p. m. of the same day, and further proceedings were had therein as follows:)

Examiner Newcomb: We will proceed with Mr. Gregory after you finish with your next witness, Mr. Howard. Who is your next witness?

Mr. Howard: The Examiner asked me for a statement or a list of the witnesses that we proposed to use. There are three remaining witnesses: Mr. D. A. McKinney, Mr. C. S. Christian and myself that will be called by the petitioner. I will ask Mr. McKinney to be sworn.

D. A. McKINNEY, President of the D. A. McKinney Coal Company, Clarksville, Arkansas, was duly sworn and testified as follows:

Direct examination.

By Mr. Howard:

Q. Please state your name and address, Mr. McKinney.

A. D. A. McKinney; address, Clarksville, Arkansas.

{fol. 85] Q. What business are you in?

A. Coal business.

Q. How long have you been in that business?

A. In the Spadra field near Clarksville?

Q. No, just generally.

A. All my life, ever since I was nine years old.

Q. How many years is that?

A. About 43 or 44 years.

Q. How long have you been in business in the Spadra field in Arkansas?

A. Since 1913.

Q. Since 1913. Are you an operator now in the Spadra field?

A. Yes, sir.

Q. And you have been in business as a producer of coal in the Spadra field since 1913?

A. Yes, sir, since 1913.

Q. You are entirely familiar with the conditions in that field?

A. I ought to be, from about 1913 I put in my entire time there mostly.

Q. And you have produced your own coal and sold it yourself and through other selling agents?

A. Through jobbers, yes, sir.

Q. How has the coal from the Spadra field been sold, as [fol. 86] to what classification?

A. Ever since I have been in the field, as Arkansas anthracite or Spadra anthracite.

Q. You believe that the coal produced in the Arkansas Spadra field does not come within the definition outlined in the Guffey-Vinson Coal Act?

A. I don't think it would come under it.

Q. You desire to have the production produced by you excluded or included under the Act?

A. Excluded.

Q. Excluded?

A. Yes, sir.

Mr. Howard: That is all, Mr. Examiner.

Examiner Newcomb: Does the Solicitor's Office have any questions?

Cross-examination.

By Mr. Riddle:

Q. Whom do you sell your coal to? Do you sell your coal to the Binkley Coal people?

A. No, sir, not altogether. We have several different jobbers that handle our coal.

Q. But you sell a part of your production to the Binkley Coal Company?

A. When we get orders from them. We sell to any local jobber.

Q. And they advertise it as Spadra anthracite of [fol. 87] Arkansas?

A. Arkansas anthracite.

Q. Arkansas anthracite?

A. Yes, sir.

Q. And they also advertise it as Spadra?

A. I beg your pardon?

Q. They advertise also as Spadra?

A. We used to advertise it and sell it as Spadra Arkansas, Spadra anthracite.

Q. How close are your mining operations to the Sunshine Anthracite Coal Company's mine?

A. I did not hear you.

Q. How close are your operations to the Sunshine operations?

A. I operated the Sunshine mine from 1913 to approximately 1917. I operated the Sunshine mine. My present operation is three miles north, in the north Spadra field, what they call the north Spadra field. I also operated what they call the Rajada mine, two miles north of the Spadra field. I have operated three properties in the Spadra field since 1913.

Mr. Riddle: That is all.

Mr. Puterbaugh: Mr. Examiner, may I ask the witness a question?

Examiner Newcomb: If Mr. Riddle has finished.

[fol. 88] By Mr. Puterbaugh:

Q. How many mines are operated in the Spadra field?

A. Well, we had the—

Q. (Interrupting) You do not need to list them. Just give the number. Aren't there about ten?

A. Yes, approximately ten.

Q. They all produce about the same amount of tonnage per day, don't they?

A. Well, some small tonnage and some larger tonnage.

Q. The capacity runs around 200 tons a day, doesn't it?

A. Well, approximately. I would say 150 to 350.

Q. We haven't anything in the record yet to show the approximate annual sales of the different companies down

there. Do you know what the sales of Spadra coal were last year?

A. I know what some of them were. You mean as to the prices or the entire total sales?

Q. No, the tonnage that the field produced. How much was involved?

A. You mean the total sales?

Q. Yes.

A. No, sir, I haven't any record of any total sales from the Spadra field.

Q. Do you happen to recall what you produced last year [fol. 89] and sold?

A. No, sir, I could not recall it just offhand. I could not.

Q. Possibly 25 or 30 thousand tons, wasn't it?

A. Well, approximately 20 thousand maybe, something around in there.

Q. 20 to 25 thousand tons?

A. Yes, sir.

Q. Just what is your reason for wanting to be exempted from the Guffey Act?

A. I just don't think it comes under the bituminous coal or subbituminous or semibituminous. I have been in the bituminous fields and worked in through there and we never could sell it as bituminous coal, never could get a market for it as bituminous coal. Even the screenings, we were never able to have a market for from the Spadra field since I have been in it outside of the smelters and recently the Briquet plant, a new one there. We tried to put it in steam plants and fell down on it because it had to have forced draft and other mechanical features and we could not meet the competition that we had to go into.

Q. Your idea then is just to have a freedom of prices? Is that your idea? That would not change the quality of the coal, your being exempted?

[fol. 90] A. No, sir.

Q. It would not change the cost of production? It is your only motive then that you fear that the minimum prices the Commission might fix on the field down there might be higher than you would like to sell at?

A. No, sir. My idea is this. If it is classed as bituminous coal I really think and acknowledge that I have been misrepresenting the coal for the last—since 1913. That is my reason.

Q. You do not invoice it to your wholesalers as Arkansas anthracite? You just invoice it as lump or grate or egg or slack, don't you? You don't particularly call it one thing or another?

A. No. We invoice the coal as grate or egg coal, slack or screenings.

Q. That is right, but you do not put that "Arkansas anthracite" on it?

A. No, sir. We sell the coal as Arkansas anthracite.

Q. You sell it as Spadra coal?

A. I do not sell the coal now as Spadra coal. As North Spadra, since we went into the north field I have not sold it as Spadra coal. North Spadra always.

Q. In regard to the Sunshine coal there, it is just about the same in every respect as the coal in the other mines [fol. 91] in that field, is it not, outside of impurities? They are different in through the different mines?

A. Altogether different impurities; some have more impurities than others.

Q. Those impurities are more in the nature of—

A. (Interrupting) Sulphur and other kinds of rock, other impurities.

Q. But to turn out the finished product as it is shipped to the trade is all about the same thing, is it not?

A. Some of it is not. Just like I say, some of the coal from different mines have more impurities than others.

Q. Do you think the Sunshine coal is any more anthracite or semi-anthracite than any of the rest of the mines?

A. Well, not in the neighborhood of the Spadra field. I think they are all anthracite in that same area or territory.

Q. All the mines in the Spadra field, Johnson County?

A. I beg your pardon. Not in Johnson County. We have some what they call soft coal in Johnson County.

Q. In the west side?

A. In what they call the Philpot field in Johnson County. [fol. 92] Q. There is no railroad to those mines; they are just little mines that wagons haul coal from?

A. It is truck business. A good deal of coal comes in through them in shipping. It is a soft coal though.

Mr. Puterbaugh: I just wanted to bring out the thought that you had, where you thought it would be a benefit to you to be exempted.

Examiner Newcomb: Does Consumers' Counsel have any questions?

Mr. Bramlette: If the Examiner please, I would like to ask Mr. McKinney some questions.

Examiner Newcomb: You may proceed, Mr. Bramlette.

By Mr. Bramlette:

Q. Mr. McKinney, I believe you stated that you had been operating in the Spadra field since 1913?

A. That is right.

Q. At which time you were operating the Sunshine mine?

A. Yes, sir.

Q. Is that the same mine that the Sunshine Anthracite Coal Company is now representing in this hearing?

A. In the same tipple, putting the same opening up.

[fol. 93] Q. You say the same opening?

A. I don't know whether you would call it mine or tipple or opening.

Q. It is a different proposition. I want to ask you if it is the same mine opening.

A. The same mine. It is going into the same coal.

Q. That is the point I wanted to bring out exactly. You say you were later connected with the Rajada Coal Mining Company in the Spadra field?

A. Yes, sir, Spadra Coal Company, Rajada Mine. Let me get you straight. Spadra Coal Company, Rajada mine.

Q. The Spadra Coal Company operated the Rajada mine some two miles north of the Sunshine mine?

A. That is right.

Q. You are now operating another mine; what is the name of that one?

A. Approximately three miles north. The D. A. McKinney Coal Company.

Q. Three miles north of the Sunshine mine?

A. Yes, sir.

Q. Is the coal that you produced when you were connected with the Spadra Coal Company in the Rajada comparable with the production of the Sunshine mine?

A. I did not understand you.

[fol. 94] Q. Is the coal that you produced when you were connected with the Spadra Coal Company at the Rajada mine comparable with the coal produced in the Sunshine mine?

A. Well, practically as to preparation and stuff it would be.

Q. It comes from the same seam?

A. It is practically on what we consider the north side of the fault.

Q. Was the Rajada mine at the same depth and surface on the same seam of coal?

A. No, the Rajada mine is 310 feet.

Q. How deep was the Sunshine mine?

A. The Sunshine mine was nearly up on the crop, on the opposite side, approximately 100 feet.

Q. Are you prepared to say that the production from the Rajada mine is comparable with the production from the Sunshine mine when you operated it?

A. That is why I moved over in that field.

Q. Then I want to ask you this question. Is the production that you now have in the D. A. McKinney mine, which is three miles north of the Sunshine mine, comparable with the production from the Sunshine mine?

A. On the market, no. On the present day market we have a differential through there that we have to contend with.

[fol. 95] Q. What is the cost of that differential?

A. The differential is 75 cents, through the operation of the strip mines over there on the Spadra coal, through a marketing proposition and it is still established and we meet it on the market today.

Q. Is the quality of coal that you produce in your present operations comparable with that produced by the Sunshine Anthracite Coal Company?

A. We leave that up to the dealers and the people that consume it as to being the judge of that when we can sell it.

Q. Is the production you are now putting on the market comparable with the Rajada production?

A. Sometimes we can—we try to induce a fellow into believing this, Arkansas anthracite coal is capable of standing up with anything on the market, but other places we cannot, through the propaganda that has recently been through there, we cannot get them to see it.

Q. Then, Mr. McKinney, as I understand it, you contend in your testimony here that the coal that you are now offering on the market, that the D. A. McKinney Com-

pany coal is not comparable with the coal of the Sunshine Anthracite Coal Company?

A. No, I don't take that position. We leave that up to our trade.

[fol. 96] Q. Oh, it is a selling proposition?

By Mr. Riddle:

Q. What do you think about it?

A. I beg your pardon?

Q. What do you think about it?

A. Think about what?

Q. What you have been talking about.

A. A man that don't think his own product is the best in the world ought not to be in the business.

Q. I am asking you what you think.

A. I think I have got the best product in the world, like you or anybody else in the business thinks.

Q. That is what we have been trying to get you to say.

By Examiner Newcomb:

Q. Mr. McKinney, you have been a coal operator for many years?

A. Yes, sir.

Q. You are quite familiar with the fields in this neighborhood, are you?

A. Yes, sir.

Q. What Mr. Bramlette and Mr. Riddle have been attempting to have you answer is this: What is the comparison between your coal that you are mining now and the Sunshine Anthracite Company's coal?

[fol. 97] A. Very little. Very little outside of two preparations. We might get some dirty coal through and they might get a car of dirty coal through. I don't know how they want to compare it or what their idea is in getting it.

Q. Would you say it was the same type of coal, same rank of coal?

A. Practically the same.

Examiner Newcomb: Is that in substance your question, Mr. Bramlette?

Mr. Bramlette: That is it.

Examiner Newcomb: Anything further from this witness? Consumers' Counsel?

By Mr. Machugh:

Q. Mr. McKinney, for what period of time did you operate the Sunshine Anthracite Coal Company at Clarksville, Arkansas?

A. For what period of time?

Q. Yes.

A. Approximately, I think, to about 1917, and then it went over under the name of The Spadra Coal Company then.

Q. How long did you operate it under the name of The Spadra Coal Company?

A. We kept it then up until the time we turned the mine [fol. 98] loose and started the Rajada mine, what we call the Rajada mine for the Spadra Coal Company.

Q. What time was that?

A. It was approximately—we started the mine in 1920 but we did not complete it until sometime in 1924 or 1925.

Q. How long have you been operating the D. A. McKinney Coal Company?

A. Since a year ago in November, the D. A. McKinney Coal Company.

Q. You operated the Spadra Coal Company up to the time that you began to operate the D. A. McKinney Coal Company?

A. Yes, sir.

Q. What is your position or office in the D. A. McKinney Coal Company?

A. President.

Q. You are president?

A. Yes, sir.

Q. Are you able to estimate the amount of the annual tonnage of that company?

A. Well, the possibility of annual tonnage is mostly from the market that we can produce. The market is all there is to it.

Q. Are you able to give any figure as to the tonnage?

[fol. 99] A. Approximately twenty to twenty-five thousand tons. It should go up higher than that. It all depends on the market, that is all.

Q. Was that the minimum or the maximum figure that you just gave?

A. That is just a possible regular run that it ought to have.

Q. That is the best estimate you can make at this time?

A. Yes, sir. It is mostly the running time and the market that we have that creates the tonnage for it.

Q. Do you know the production of the entire Spadra field?

A. It has fallen off in the last year. One time I think it was possibly around four hundred thousand tons or maybe a little higher.

Q. When was it approximately four hundred thousand tons?

A. Along during the war times.

Q. What do you think it was last year, at any time last year?

A. Approximately one hundred and seventy-five thousand tons, I think. The last period of years hasn't been no tonnage.

Q. Where is this coal produced by the D. A. McKinney Coal Company sold?

[fol. 100] A. It goes in through Minnesota, the Minneapolis territory, Nebraska territory, and some in Kansas—very little. Just where we can find a market for it.

Q. How much of your coal is sold outside of Arkansas, what percentage?

A. Most all of it. Very little percentage we sell in Arkansas since the gas and oil went into effect.

Q. Are you able to estimate what that small percentage you might sell in Arkansas would amount to?

A. It would not be but one or two per cent, I do not think.

Q. You feel that coal produced in the Spadra field should not be classed as bituminous coal under the Bituminous Coal Act? Is that correct?

A. I beg your pardon?

Mr. Machugh: Read the question.

(The question was read by the reporter.)

A. That is correct. That is what I feel.

By Mr. Machugh:

Q. When you say that, are you speaking for the D. A. McKinney Coal Company or the Sunshine Anthracite Coal Company or for the entire field?

A. Speaking for the D. A. McKinney Coal Company.

Q. Have you filed an application to that effect, Mr. McKinney?

[fol. 101] A. No, sir. We figure on doing so, though.

Q. I did not hear your answer.

A. No, sir, but we figure on filing application to be exempt from it.

Q. You intend to do so?

A. Yes, sir.

Q. But you have not done so yet?

A. No, sir. I have not gotten along that far. This thing is too fast for us. We are small town people; we cannot keep up with it.

Q. In your testimony now you are speaking for the D. A. McKinney Coal Company?

A. Yes, sir.

Q. And not for the Sunshine Anthracite Coal Company?

A. No, sir.

Q. What, in your opinion, will be the effect upon consumers of granting the exemption, first, to the Sunshine Coal Company?

A. I don't understand what you mean.

Q. The Sunshine Coal Company has requested an exemption. You understand that?

A. Yes, sir.

Q. If that exemption is granted, what in your opinion will be the effect upon the consumers?

[fol. 102] A. I don't know.

Q. Of Sunshine coal?

A. I can state it this way, that I have no objection to the Sunshine having exemption but I wish to have the same right myself.

Q. What do you think will be the effect of granting the exemption to your company from the consumers' point of view?

A. I don't think it will injure me, if that is what you mean, in the least.

Q. What effect will it have upon the consumer? Are you able to answer this question?

A. I could not answer for the consumer; I could not answer it.

By Examiner Newcomb:

Q. Mr. McKinney, granting an exemption, do you know what economic or other effect it will have upon the con-

sumer, the one that buys and uses the coal? Is that question clear to you?

A. In what way do you mean? Do you mean that it would injure somebody else?

Q. Would it benefit or injure the consumer in any way?

A. I think it would benefit the consumer.

Examiner Newcomb: That is what Consumers' Counsel wants to know.

[fol. 103] By Mr. Machugh:

Q. In what way?

A. As to being able to produce the coal at a reasonable price and meet the competition from the other different fuels, the oil and gas that we have got. It is strictly a domestic coal, it always has been since I have been in the field.

Q. Are you able to say what type or class of consumers use the coal of the D. A. McKinney Coal Company?

A. Mostly in small furnaces and arcolas and heating plants.

Q. Are there any large companies, large consumers?

A. Not that I know of. I don't recall. I never went into that part of it.

Q. Could you name two or three representative consumers of the coal of the D. A. McKinney Coal Company?

A. No, sir, they are practically all domestic consumers, mostly what we figure our users of our coal. Whether they are large or small, I could not tell you.

Q. You have nothing further to add as to the harmful or beneficial effect upon the consumer of the granting or declining of this exemption?

A. No, sir. I do not think it would injure the consumer by granting the exemption.

Mr. Machugh: Those are all the questions at present, Mr. Examiner.

[fol. 104] Examiner Newcomb: Any questions on behalf of the United Mine Workers, Mr. Fowler?

By Mr. Fowler:

Q. How many days did your company work last year?

A. The last run?

Q. Yes.

A. I could not tell you offhand. Probably 180.

Q. 180. You worked a great many more days than they did on the south crop on the main line?)

A. I operated one time over on the south mine. When I run the Sunshine mine a couple of years and when I run the Rajada mine.

Q. It is a fact that when you were on the north crop you had a lower wage rate?

A. No, sir, we have never had a lower rate. That is all poppycock.

Q. Last year, under the last agreement?

A. No, sir.

Q. The rates were lower?

A. No, sir. The costs were not lower.

Q. The costs may not have been but the rates were lower?

A. In what way?

Q. Lower tonnage?

A. Well, there was lower tonnage.

Q. Your tonnage rate was not the same last year?

[fol. 105] A. You remember when that was put on, don't you, Dave?

Q. Yes.

A. You put it on there, I did not.

Q. Have you increased the tonnage on the north crop this year over and above the tonnage of last year?

A. That is right. Away yonder, too.

Q. Yes, we increased it?

A. Yes.

Q. Isn't it a fact that you were able to put the coal on the market cheaper then and threw the miners out of work?

A. No, sir. We gave our miners work.

Q. Will it increase the earning power of the miners on the main line when they mechanize the mines on the north crop?

A. It increased our miners earning power.

Q. It increased yours, but will it increase the miners' earning power on the main line?

A. I don't see how it would.

Q. They do not work 180 days on the main line; they did not last year?

A. I did when I was over there. When I was running the Sunshine mine in 1917, the Pittsburgh & Midway handled the coal and Mr. Bramlette was the salesman for them at the time and I ran 180 days right in there and had the [fol. 106] same scale of wages paid them all the time.

Q. But we did balance the wage rates and tonnage rates up with the main line this time?

A. No, sir. You gave me a higher cost.

Q. But you are not paying any more than they pay on the main line?

A. Yes, sir.

Q. You are?

A. Yes, sir.

Q. How much more? What do you pay more?

A. You have increased it there.

Q. I am not asking you that. How much do you pay more than the main line?

A. Than the main line?

Q. Yes, sir, today, in the Spadra field?

A. We are at an increase over what we were.

Q. Yes, but you are paying the same rates that

Mr. Waldron: Mr. Examiner, I do not desire to interfere with the two gentlemen's conversation, but I do object to this going into the record. I think it ought to be off the record.

(A discussion was had off the record.)

Mr. Fowler: I am trying to bring out when negotiations are made for a contract in this field and we have a lot of 'semis' around here that none of us know anything about, it is semi this and semi that. This wage contract of ours [fol. 107] carries all of those things in it and we have a contract made in the Pocahontas field that is one-tenth as much as that is because we have had to take care of this question. In the negotiations of contracts their contract was based on the bituminous wage scale and based upon the tariff scale. Every bit of it was based on that. They refused to discuss anthracite coal then. Why should they discuss it now? The anthracite question was before that joint board. There was not an operator from that part of the field that did not want to be classed as anthracite because he knew that if they classed this in competition with anthracite that we would ask for a higher wage. The same thing in the selling of coal, the differential that is made in this district against Illinois. Our miners are receiving 75 cents a ton less than Illinois because we granted a differential in this district on the present basis of selling coal, the freight rates, and everything that goes into it.

The point I am trying to get at, that if a concession is to be granted to the operator, then in accordance with this agreement that says that the differential shall be investigated, I am looking to reopening this wage contract. I am not looking to see that the seller gets more than a dollar a ton for selling this coal and the laborer gets 60 cents for loading it. I am looking to reopening this scale.

[fol. 108] Examiner Newcomb: What is the wage differential?

Mr. Fowler: 75 cents between here and Illinois in its rate.

Examiner Newcomb: I mean what is the differential between anthracite and bituminous?

Mr. Fowler: Oh, it will be over a dollar.

Examiner Newcomb: If that is your purpose to show that these people claim that they have semi-anthracite coal here and semi-anthracite operations but they entered into an agreement with you on a bituminous wage scale, that would be enlightening to us and I welcome such interrogation, Mr. Fowler.

Mr. Fowler: Yes.

Examiner Newcomb: Because it will be a guide to ascertaining just what type of mining it is and that is what we want to know. But will you please confine yourself to that, Mr. Fowler, and then later on you can come as a witness and state your views and the different problems that you have to cope with and what you want to avoid.

Mr. Fowler: The point I am trying to impress is this, that we are not going to permit the 75 cents differential between us and Illinois to give them the privilege of going into a market and underselling the other operators in this field [fol. 109] and throwing us out of work. We have been willing to concede that 75 cents because of the oil and gas competition, but we are not willing to permit that to be given back to the operators that go into the market and undersell everybody in the industry. There are human souls to be taken care of.

Examiner Newcomb: You will have an opportunity to state that on the record, Mr. Fowler, but if these people are being paid for mining bituminous coal and really are mining anthracite and getting anthracite prices, we want to know that.

Mr. Fowler: I would like to see them paid the anthracite wage rate. If they are anthracite I would like to see them pay it.

The Witness: It is a fact, Mr. Examiner, that we have the highest tonnage and wage scale.

Examiner Newcomb: Is that all, Mr. Fowler?

Mr. Fowler: Yes, sir.

Examiner Newcomb: Any further questions?

Mr. Puterbaugh: Mr. Examiner, I have some questions I would like to ask.

Examiner Newcomb: Proceed, Mr. Puterbaugh.

By Mr. Puterbaugh:

Q. It is a fact that your principal competitor of Spadra coal is the coal from Paris and Western Arkansas?

A. No. Oil and gas has been our greatest competitor.

[fol. 110] Q. I mean in coal.

A. Well, coal and everything. I think you will recollect that one time along during the period we had farmers for competitors. I swapped coal. We could not sell our coal; Nebraska farmers burned corn because they could not buy our coal. You recollect that. We even went so far as to swap coal. We needed the corn and I told them that they needed the coal, and that is the way we bought the corn.

Q. When you go to fix your price on coal you want to know what Paris is going to put out in the way of prices, don't you?

A. No, not altogether. I am interested.

Q. Not altogether?

A. I want to know what the market is that they are selling to. If I can meet the competition, all right; if I can't, I will back off.

Q. You want to know what semi-anthracite is bringing?

A. I beg your pardon. On semi-anthracite, what they call semi-anthracite—when I first started in the Hartford field we advertised it as Arkansas smokeless coal. Where the semi-anthracite came in, it came in between that time and this.

Q. But primarily the competitive coal of the Spadra district is the other coal produced in Western Arkansas?

A. Russellville and Bernice are our closest competitors.

Q. That is in the same classification as Spadra?

A. Yes, sir.

Q. But also in the Paris and Sebastian County?

A. That is the only one outside of oil and gas. They are all competitors. Illinois, Pocahontas, West Virginia and Kentucky.

Q. If your coal could meet the coal that was exempted and the Government would fix the minimum prices on Sebastian County coal, on Excelsior group coal and on the Paris group coal, limiting them to some minimum figure, in the interest of the laborer and to the interest of the industry as a whole, but would leave you and the Binkley Coal Company free to make any prices that you might be able to make or want to make, don't you think that that would tear down the whole idea of stabilization that was contemplated by the Bituminous Coal Act?

A. No, I don't think that the Binkley Coal Company or myself, I don't think we could fill all the market in there at a time when coal is in demand.

Q. But your idea would be that you would run more time than otherwise?

[fol. 112] A. Probably. If you can get a closer margin on your coal you can cut down your costs by running time. You have a certain overhead and you can decrease your operating expense and cut your cost of producing the coal.

Q. That is your reason that you would like to be exempted?

A. Yes, I would like to cut my running costs. A coal miner or laborer or nobody else can make a living if you pay them twenty dollars a day and only work twenty or thirty days in a year.

Q. Is it not a fact that the mines in that field have failed to make any money, any profit for a number of years, to speak of?

A. I don't believe they have lost any money or they could not be there yet, frankly.

Q. You said you were in the Spadra Coal Company at the Rajada mine?

A. That is right.

Q. Did that mine make money?

A. It did while I was there.

Q. How did you come to leave it?

A. That is a story that I do not care to recall.

Q. The point I am trying to bring out is that the field has not made any money and you have struggled and I have struggled and all of us have struggled and tried to break [fol. 113] even?

A. I do not ever intend to be a millionaire. I could not handle it if I had it. I want to make an honest living. I want my employees to have an honest living, and I want to

put forth every effort I can, but I do not think the public or anybody else should be held up.

Q. You agree with this, that if your mine or if the Binkley Coal Company mine is exempted from the Coal Act or the fixing of prices, then it would be proper to exempt all the mines in the Spadra field and all the mines—

A. It would be if they wished it. I think every mine in the Spadra field, if they wished it, should be exempted—not myself and the Russellville property but I think if you wanted exemption you should have it, regardless of whether you could produce your coal cheaper than me. I am for you if you can do it, or any other operators.

By Mr. Riddle:

Q. Mr. McKinney, you have accepted the code under the National Bituminous Coal Act, have you not?

A. I beg your pardon?

Q. You have accepted the code under the National Bituminous Coal Act of 1937, have you not?

A. Under protest is all.

[fol. 114] Q. You have accepted it?

A. Yes, sir, sure.

Q. Are you acquainted with anthracite coal?

A. I am just now. That is what they are trying to do. That is what we have represented it as, Arkansas anthracite, since 1913.

Q. Would you call either of these specimens anthracite?

A. I am not a chemist and at the present time I do not have my glasses.

Q. You have put in thirty years in this field. Is either one of those coals anthracite or semi-anthracite?

A. I just told you I am not a chemist.

Q. What is your opinion?

A. If you will break that up and get me a light I will take an analysis and try to separate it.

Q. I am not asking you for a speech.

A. That is the way you find out.

Q. You would not express an opinion on that?

A. I am not a chemist. I am trying to explain to you that I am not a chemist.

Q. You do not have to be a chemist.

A. I could not give you a perfect answer on it.

Q. You have been an operator for years and years?

A. Yes, sir.

[fol. 115] Q. You have operated a coal mine and you have dug coal in a coal mine?

A. Yes, and whenever I want a chemical analysis I take it to a chemist.

Q. Yes and whenever we want one we take it to them. You know what is coal and what is not coal, all the way from peat up to anthracite?

A. I know what lignite is pretty well.

Q. Yes, and you know what bituminous coal is?

A. Offhand I do; I am not a chemist.

Q. Is this anthracite or bituminous?

A. I am not a chemist, I told you.

Q. If that came from your mine would you know it?

A. I am not advertising your coal.

Q. Answer the question. Is that anthracite coal?

A. I just told you that I could not tell you; I am not a chemist.

Q. Suppose that that came from your mine; would you know the coal?

A. Mr. Examiner, I am trying to answer the man's question.

Q. No, you are dodging everything I have asked you.

By Examiner Newcomb:

Q. You have had about twenty years experience in operating mines in this district?

[fol. 116] A. What mine did it come from?

Q. He has not asked you what mine. He is asking you if this is comparable to the coal you are mining or is it the coal?

A. I cannot tell you.

Q. Can you look at it and touch it and tell us whether there is a similarity to it?

A. I cannot tell you. Nobody can tell a piece of coal just by looking at it. I want to explain my reason to you.

Examiner Newcomb: Ask him one more question and if he does not know, that is the end of it.

By Mr. Riddle:

Q. Is that anthracite or bituminous?

A. I don't know.

Q. Is that anthracite?

A. I don't know.

Q. Do you see any difference between those coals?

A. In what way do you mean? They are black.

Q. I am asking you if you see any difference?

A. They are black, all black.

Q. Is there no difference in the structure; no difference in the color?

A. They are all black. I am just telling you.

Q. No difference in the break-down? No difference in the [fol. 117] break-down or the break-up? You know what I am talking about?

A. You asked me if there is a difference in the coal. I said they are all black.

Q. Would you say that is anthracite?

A. No, I would not say.

Q. You do not want to answer the question, do you? That is all.

Examiner Newcomb: Any further questions? Did you want to ask a question, Mr. Plein?

Mr. Plein: Yes, sir.

Mr. Waldron: Mr. Examiner, Mr. Plein wanted to ask a few questions.

Examiner Newcomb: Very well, Mr. Plein.

By Mr. Plein:

Q. Now, you have explained your experience there. Am I correct in understanding that you have worked principally in Arkansas coal fields? Have you ever worked in Kansas or Illinois?

A. Yes, sir, in and around the Pittsburg, Kansas field. I was raised there.

Q. Have you ever worked in any Illinois coal fields?

A. Yes, sir. In and around Marysville, and Belleville.

Q. Have you ever worked in any Pocahontas fields?

A. No, sir, I never worked in a Pocahontas field. I have [fol. 118] been through it.

Q. Have you ever worked in the Pennsylvania anthracite field?

A. No, sir. My father was there and I was there when I was a boy, around the Scranton field. I used to pick slate around there when I was a kid.

Examiner Newcomb: Strike out everything subsequent to his answer "No." We are not interested in the rest of it.

By Mr. Waldron:

Q. Most of your experience then has been in this area around through Arkansas and part of Kansas, is that correct?

A. Yes.

Q. What do you understand when you speak of rank in coal?

A. Do what?

Q. When people speak of the rank of coal, what in your opinion does that mean?

A. I cannot get that.

Q. Chemists and geologists and engineers refer to different kinds of coal by rank. Is that a familiar word?

A. I am sorry. I cannot get that in my head. What are you trying to get to, me?

Q. They speak of the classification of coal by rank.

[fol. 119] A. By rank, is that the word?

Q. Yes, sir.

A. The only way I know and the way I was brought up on classification of coal is like the code authorities have it, bituminous, semibituminous, subbituminous, lignite or anthracite. That has always been the way I have classified coal or had them classified. That is what I would call classification. The coal is either bituminous, semibituminous, subbituminous, lignite, or anthracite. That is the way I would classify coal. I don't know; I might not be right.

Q. That is all right. What do you mean, what comes to your mind when people speak of the classification of coal by grade?

A. By grade?

Q. Yes, sir.

A. That is possibly removing the refuse and stuff like that, a grating coal.

Q. Perhaps you did not understand me. I mean the classification of coal by grades?

A. I cannot get you; it is too deep for me.

Q. In your testimony you have been speaking about the comparison of the Sunshine anthracite mine and the mine you now operate, and you spoke about the impurities that may be in your coal from time to time—

[fol. 120] A. Yes, sir.

Q. (Continuing)—or at the other mine.

A. Yes, sir. That is sulphur and pyrites and veeses. I don't know whether you are familiar with that.

Q. What is that last one?

A. Veeses—v-e-e-s-e-s; little hard white substances in through the coal. Those are impurities. Pyrites and sulphur and veeses. That is the way we classify them.

Q. Do these impurities in the coal, in your opinion, effect the rank of the coal?

A. Effect it?

Q. The rank. Does it effect the rank of the coal?

A. I do not get you. The rank?

Q. Yes, the percentage of ash in the coal.

A. It would to the consumer. You cannot get that dirt and refuse out of it. It effects the fire and heat. It effects it.

Q. This seam of coal you are now working, I understand that is the Hartshorne seam. What is its local name?

A. I don't know what the geologists classify it. They have always called the different fields through here—the Hartshorne field is supposed to be over near Wilburton. We have what is classed as the Hartford field and the Greenwood and the Excelsior field and the Denning field and the [fol. 121] Spadra field and Russellville field and Bernice. As a geological survey, I don't know, really. My own views and personal views from the time I went into what they call the Spadra anthracite field, my position was all the time it was semi-anthracite.

Q. I have just one more question, Mr. McKinney. In classifying these coals in your mine, you base this classification upon your experience in these bituminous and semi-bituminous and so-called semi-anthracite coal in this Middle West area?

A. That is right.

Q. You have never had any experience other than what you have told us about in the southwestern fields and what your father told you about in the Pennsylvania anthracite and Virginia anthracite?

A. No, sir.

Mr. Waldron: That is all.

Mr. Howard: Mr. Examiner, may I ask one question?

Examiner Newcomb: Yes.

Redirect examination.

By Mr. Howard:

Q. Mr. McKinney, you spoke about your coal, of selling the screenings; that you could not sell these screenings as bituminous. Why was that?

Q. A. Well, we could not get enough forced draft under them [fol. 122] mechanically and we could not put it on the market.

Q. Was that because the coal did not ignite easily?

A. It is not a free burning coal, what we call a free burning coal.

Mr. Riddle: Mr. Examiner, may I ask the witness a question?

Examiner Newcomb: You may, Mr. Riddle.

By Mr. Riddle:

Q. There are a great many screenings in the bituminous fields for which they cannot get markets at all times, isn't that right?

A. I beg your pardon?

Q. There are a great many screenings in bituminous fields that they cannot find markets for?

A. That is true, I suppose, and in the ice business too.

Mr. Fowler: Mr. Examiner, may I ask the witness a question?

Examiner Newcomb: You may, Mr. Fowler.

By Mr. Fowler:

Q. Mr. McKinney, in 1936 we gave a contract or opened a contract to make some slack over in that field, didn't we?

A. When was that?

[fol. 123] Q. There wasn't sufficient slack in the Spadra field and they asked them to open their mines so many months—

A. (Interrupting) That is right.

Q. (Continuing)—and asked for a day rate to make the slack?

A. Right now that demand is in there. We cannot furnish the slack right now; we cannot furnish it to the smelters.

Mr. Fowler: That is all.

Examiner Newcomb: Does Consumers' Counsel have any further questions?

By Mr. Machugh:

Q. Do you know how much coal is mined in the State of Arkansas annually?

A. No, sir. It is up pretty high according to the geological survey. It is not as high as it used to be twenty years back there.

Q. Are you able to give us an estimate?

A. No, sir. I have not kept up with them.

Q. Do you know how much of the coal mined in Arkansas is shipped out of the state, either in percentage or in round figures?

A. I would not be positive of it. Approximately I would say that there is not much more than ten per cent of [fol. 124] Arkansas coal—fifteen per cent at the most—used in Arkansas. Probably between ten and fifteen per cent.

Q. That is shipped out of the state?

A. No, sir. That stays in the state.

Q. That is, the bulk of it is shipped out of the state?

A. Yes, sir.

Q. Do you know what per cent of the total coal is represented by that mined in the Spadra field?

A. No, I could not tell you that. The Spadra field last year, I think, ran around approximately 175,000 to 200,000 tons. Like Mr. Fowler just said, a good deal of that was made into slack, crushed into slack, to protect their market to the smelters.

Q. You don't know what percentage Spadra coal would be of the production of the entire state?

A. No, sir.

Mr. Machugh: Thank you, Mr. McKinney.

Examiner Newcomb: That is all. Thank you.

Mr. Howard: That is all.

Mr. Milligan: Examiner, may I ask the witness one question?

Examiner Newcomb: You may, Mr. Milligan.

By Mr. Milligan:

Q. You spoke of screenings. Do you use a shaker screen in screening that coal?

[fol. 125] A. I beg your pardon?

Q. When you speak of screening, do you use a shaker screen to screen it?

A. Yes, sir.

Q. What kind of plate do you use; is it a perforated steel plate?

A. A perforated round plate. You have to use some soft screens to pick out the fine dirt.

Q. What size round holes does your slack coal pass through?

A. Five-eighths.

Q. Five-eighths?

A. Yes. We cannot put it through the half-inch.

Q. Can you tell me what percentage of the coal passes through that five-eighths inch screen?

A. It is supposed to be approximately around twenty-two to twenty-five percent, when they don't crush it.

Q. Twenty-two percent through a three-quarter inch screen?

A. I would say approximately twenty-five percent.

Q. As mined. That is twenty-two to twenty-five percent of your mined run coal will pass through a three-quarter inch screen?

A. Yes, sir, that is correct.

[fol. 126] Mr. Milligan: That is all. Thank you.

(Witness excused.)

Examiner Newcomb: Will Mr. Gregory take the stand now, please?

Mr. Howard: Mr. Examiner, before we proceed with Mr. Gregory, I wonder if I might clear up in my mind a question. I am a little at a loss from Mr. Riddle's objection to evidence and also from his cross-examination as to just what the position of his party in interest is. Do I understand that as a representative of the Bituminous Coal Commission they are opposing the petition at this time?

Mr. Riddle: We are here trying to get the truth, and that is all.

Mr. Howard: Didn't you make the statement to me that you were here for the purpose of figuring this under the tax, on the one cent tax?

Mr. Riddle: If the proof brings it there, all right. If you are entitled to exemption, you ought to have it, and we will so say to the Commission and the Commission will give it, but we want the truth in this hearing, the facts in relation to this coal.

Examiner Newcomb: It is not the position of the Legal Department to occupy the role of prosecutor, if that is the impression you have gathered, Mr. Howard. I am sure you have the wrong impression.

[fol. 127] Mr. Howard: The impression I have gathered up to date is that the attitude of the legal representative of the Commission has not been what I would call impartial.

Mr. Riddle: I am willing to be tried and stand on my record.

Examiner Newcomb: You may state whatever you wish for the record, Mr. Howard.

Mr. Howard: It has already been done.

Examiner Newcomb: Mr. Gregory will take the stand, please.

WILLIAM G. GREGORY, Vice President, Binkley Coal Company, Chicago, Illinois, resumed the stand and further testified as follows:

By Examiner Newcomb:

Q. Mr. Gregory, have you any analyses of the coals of this Sunshine Anthracite Coal Company with you?

A. Just those that are submitted. I do not have anything with me. Those that were submitted in the evidence.

Q. Those analyses that have been submitted in evidence, were they based on face samples?

A. No, sir. They are based on delivered coal. That is the only fair way that samples can be taken.

Q. Have you any analyses based on samples that were collected from the top and the bottom of the mine?

[fol. 128] A. No. We have had no occasion to take any, Mr. Examiner.

Q. If I am asking you any questions you feel you are not qualified to answer and you have some one else here that can answer them, do not hesitate to tell me so, Mr. Gregory.

A. I can answer those this far.

Q. Do you have any analyses showing the character of the different benches of coal seen from top to bottom of your mine here?

A. No, sir.

Q. Do you have an analyses based on coal samples taken from railroad cars after the coal had been prepared for marketing?

A. Yes, sir. That is the way all the samples are taken.

Q. And that is what these samples are that you have introduced in evidence?

A. Yes, sir. Just the run of coal as it is shipped to the market.

Q. And those are the only analyses that you want the record to show?

A. Yes, sir.

Q. What sizes of coal have you had analyzed?

A. All sizes.

[fol. 129] Q. Will you enumerate them for the record, please?

A. I do not know that we have ever analyzed any grate. We have egg and nut and screenings. Those are the only sizes that we make. The coal is crushed down. We do not sell any lump coal out of this anthracite coal. They won't burn.

Q. Please explain in what physical ways your coal differs from the coals mined in your area and in the area of your mine, if any?

A. You mean in the neighborhood of the Spadra mines, the difference between our Spadra coal and the other coals around there?

Q. Any other producers around you or adjoining you, if any exist?

A. Well, there is a definite difference. The structure is generally harder than most of the surrounding coals. The volatile content is considerably lower. The principal characteristic is the non-agglutinating quality of the coal when it burns. It is strictly a free-burning coal.

Q. You give a great deal of weight to the hardness of this coal, do you not, Mr. Grégory?

A. Yes, a good deal. That is where it got its nickname of hard coal, because of the hard structure.

Q. That is one of your main-stay qualities, isn't it, in addition to the burning qualities?

[fol. 130] A. It is important in any coal but not as important as the low volatile content.

Q. But you feel that the hardness of this coal is quite important?

A. Yes, sir.

Q. Are you familiar with certain coals mined in Western Pennsylvania?

A. Some of them, yes, sir.

Q. Do you know that some of the coals mined up there which are classified and definitely known as bituminous are even harder than the coal you have here and anthracite?

A. I do not know that there is anything in there any harder, that I know of. There are some that will handle better because of the fractures.

Q. Do you know that it is just as hard?

A. Yes, there are bituminous coals that because of the different fracture and the grain of the coal they will stand handling better than the anthracite.

Q. And yet its volatile runs around thirty to thirty-five per cent?

A. Yes, sir.

Q. So you would not say that the hardness of the coal would be a definite means of determination?

A. By no means.

[fol. 131] Q. Of the rank of the coal?

A. Not at all.

Q. Do you have a map showing complete property operations of your properties that you claim are yours and what you are operating and what seams you are operating?

A. You mean aside from this?

Q. I will reframe the question. I will strike that question and I will take it subject by subject. Do you have a map showing your complete property operations here?

A. At this mine?

Q. Yes.

A. No, I have not here. We have out at the mine, of course.

Q. Could you furnish it as an exhibit in evidence here?

A. Well, we would have to get it from the mine.

Examiner Newcomb: Did Mr. Howard hear the question.

Mr. Howard: Am I correct in that it is a request for a map showing the acreage involved here, Mr. Examiner?

Examiner Newcomb: I want a map showing your operations, to be introduced in evidence as an exhibit, Mr. Howard.

Mr. Howard: Yes, I think we can obtain that.

[fol. 132] By Examiner Newcomb:

Q. Do you own these properties in fee or do you lease them?

A. We lease them.

Q. Or what is your method of operation?

A. We own the equipment. We lease the land on a royalty basis.

Q. I am speaking of the property.

A. The coal belongs to the other people.

Q. You lease the property?

A. Yes, sir.

Q. It is quite customary in the trade?

A. Yes, sir. A great many of our mines are on lease.

Q. When you submit this map in evidence would you please show on the map where the analyses, or I mean where the samples were taken from that resulted in the analyses introduced in evidence?

A. We would not know what part of the mine the coal came from because of the coal being taken from the cars.

Q. I do not ask you for the exact footage but I mean the seam or vein and in what part of the mine.

A. Yes.

Q. You can easily mark that off from your operations?

A. Yes, sir.

[fol. 133] Mr. Howard: We can show the area which we have leased, the general area from which the samples that have been analyzed were taken, although we cannot give you the specific room number and the room which we propose to mine.

Examiner Newcomb: It will be quite helpful and the Examiner will be grateful to you if you will do that.

Mr. Howard: Yes, sir.

By Examiner Newcomb:

Q. What bed or seam are you mining now?

A. We are mining what is locally——

Q. (Interrupting) I am considering that you are just doing development mining now at this time and are not in full production?

A. Yes.

Q. Just what seam are you mining?

A. That is a question in itself. We are mining what is locally known as the Spadra seam. I have never seen a definite geological report of what the seam is. It is generally supposed to be Hartshorne coal all over this territory. It has a wide variation of characteristics.

Q. Do you claim your property has one seam or more than one seam?

A. Just one seam.

Q. Just one seam?

[fol. 134] A. Yes, sir.

Q. Do you know by what other name this seam is known in Arkansas?

A. Spadra.

Q. Any other name?

A. Not that I know of. I never heard it called anything else.

Examiner Newcomb: I believe that is all. Thank you, Mr. Gregory.

Mr. Riddle: Mr. Examiner, may I ask the witness some further questions?

Examiner Newcomb: Yes, Mr. Riddle.

By Mr. Riddle:

Q. I want to ask you one more question. Do you know what kind of coal that is?

A. I haven't the faintest idea. I do not think anybody can look at one piece of coal picked out of a pile of coal and tell what it is. I do not have any idea what it is.

Q. Do you have any idea—

A. (Interrupting) That is true of all of those. I would not attempt to pick out—

Q. (Interrupting) Do you know whether that is anthracite or semi or semibituminous?

A. I don't know. You can pick pieces of coal out of cars [fol. 135] any place that look like anything.

Q. Is this hard or soft coal?

A. I don't know. Drop it.

Q. Well, I would hate to use the broom.

A. Well, it is not necessary anyway. It does not have any bearing on the case.

Q. The same about this coal?

A. The same about all of them.

Q. And if this larger chunk here happens to be from your mine, you cannot recognize your own coal? Is that correct?

A. That is right. I do not think that it is from our mine, however.

Mr. Riddle: All right, that is all.

Mr. Machugh: Mr. Examiner, may I ask the witness a few more questions?

Examiner Newcomb: Yes, Mr. Machugh.

By Mr. Machugh:

Q. Mr. Gregory, do you know what the total production of coal is in the State of Arkansas?

A. No, I do not. The Government records will show, but I do not think they are much for the last year.

Q. Do you know what the total production for the Spadra field is?

A. I think it has slowed down for the past year, but about [fol. 136] 160,000 tons for the whole field. That is only an estimate, however.

Q. You are not able to say what percentage that would be of the entire state production?

A. No, sir. It has been gradually going down year after year.

Q. You are not able to estimate the production?

A. I would say about 160,000 tons for the past year.

Q. Is that for the entire state?

A. No. That is for the Spadra field, for the anthracite field.

Q. You are not able to estimate it for the entire state?

A. No, sir. We have those records as they come out, as they are published by the Government, as they are available.

Examiner Newcomb: Any other questions, Mr. Machugh?

Mr. Machugh: That is all, Mr. Examiner.

Examiner Newcomb: Does anybody else care to question Mr. Gregory?

By Mr. Puterbaugh:

Q. On what do you base the statement that it has been going down for the last few years? Don't you know as a matter of fact that it has been increasing?

[fol. 137] A. There has been considerable increase in the crushed coal, in the demand for crushed coal from the smelters.

Q. Don't you know it is a fact that the Spadra field last year produced over 210,000 tons of coal?

A. No, I do not. I said I was just guessing.

Q. I want to get you correctly on the record because later witnesses will have the correct data on that.

A. That is all right.

Examiner Newcomb: Any further questions of Mr. Gregory? If not, that is all, Mr. Gregory. Thank you.

(Witness excused.)

Examiner Newcomb: We will take a five-minute recess.

(Whereupon, a short recess was taken.)

Examiner Newcomb: Let's proceed, Mr. Howard.

Mr. Howard: The petitioner will call Mr. C. S. Christian.

Examiner Newcomb: Will you be sworn, Mr. Christian?

[fol. 138] C. S. CHRISTIAN, owner of the Diamond Anthracite Coal Company, Johnson County, Arkansas, was duly sworn and testified as follows:

Direct examination.

By Mr. Howard:

Q. State your name and business, Mr. Christian.

A. C. S. Christian. At the present time I am owner of the Diamond Anthracite Coal Company.

Q. And where does that company operate?

A. It is about three miles north of the Missouri-Pacific Railway in the Spadra field, Johnson County, Arkansas.

Q. Before you became identified with that company were you interested in the coal business?

A. I have been interested in that particular mine since 1921.

Q. And as such who has sold your coal?

A. We have had a number of various sales agents, jobbers in Kansas City and Minneapolis.

Q. Has the Binkley Coal Company ever sold any of your coal?

A. I think probably they have. I don't remember it but I think probably they have.

Q. But they are not the sales agent now, and if there is [fol. 139] any sold it is in a very small quantity by them?

A. Yes, sir.

Q. Under what grade has that coal always been sold?

A. As Arkansas anthracite.

Mr. Howard: At this point, the petitioner would like to introduce as evidence petitioner's Exhibit M.

Examiner Newcomb: So admitted.

Mr. Riddle: We would like to have an opportunity to see the exhibit before it is offered.

Examiner Newcomb: May the Examiner have a copy? You are going to have all of your exhibits photostated and furnish us copies, aren't you, Mr. Howard?

Mr. Howard: Yes, sir. This is an information circular issued by the Department of Interior, United States Bureau of Mines. Curves for the classification of coal. Issued March 1937 as Document I. C. 6933.

(Information circular on curves for the classification of coal, issued by the United States Bureau of Mines, was

marked for identification as "Christian Exhibit 13," and was received in evidence.)

By Mr. Howard:

Q. Mr. Christian, I show you this exhibit and ask you if you have examined that document?

A. I have.

Q. Have you ever discussed that document with Mr. [fol. 140] Branner, the State Geologist of the State of Arkansas?

A. I have.

Q. In connection with what?

A. In connection with the proper classification of the coal from the Spadra field.

Q. And after that discussion didn't Mr. Branner write you a letter with reference to that subject?

A. He did.

Q. I show you an original letter from Mr. Branner, on the stationery of the Arkansas Geological Survey, State of Arkansas, Little Rock, Arkansas, and ask you if that is a letter he addressed to you and whether you saw him sign it?

A. This is a letter addressed to me and he signed it in my presence.

Q. On the date shown in the letter?

A. Yes, sir.

Mr. Howard: Mr. Examiner, I would like to introduce in evidence the Petitioner's Exhibits M and N.

Examiner Newcomb: So admitted, both of them.

(Letter dated September 21, 1937, signed by George C. Branner, State Geologist, referred to as "Petitioner's Exhibit N," was marked for identification as "Christian Exhibit 14," and was received in evidence.)

By Mr. Howard:

Q. Mr. Christian, as a coal operator in the Spadra field, [fol. 141] what is your belief in connection with, or what is your belief as to whether or not the Spadra field is included under the terms of the Guffey-Vinson Coal Act?

A. I think it is not.

Mr. Howard: That is all.

Examiner Newcomb: Does the Solicitor's Office have any questions?

Cross-examination:

By Mr. Riddle:

Q. Have you accepted the code?

A. We are not operating the mine now. It is under a lease. I do not know whether the lessees have accepted it or not.

Q. You do not know whether your lessee has accepted the code or not?

A. I am not positive. I do not think he has or if he has, he has done it under protest.

Q. He is not here today, is he, claiming that his coal is anthracite or semi-anthracite?

A. Yes. He is sitting there.

Q. Is he here?

A. Yes, sir. You may ask him.

Q. Are you speaking for the Diamond Anthracite Coal Company?

A. Yes, sir.

[fol. 142] Q. Do you know whether or not they have accepted the code or not?

A. The Diamond Anthracite Coal Company itself has not. I would know if it had. That is the owner of the property. Now, the lessees may have. They have operated under the same name. But the owners of the property have not.

By Examiner Newcomb:

Q. The lessees are present at this hearing?

A. They are.

Examiner Newcomb: Does the representative of the General Solicitor's Office know the lessee's name?

The Witness: I can give it to you. It is Mr. Thompson.

By Examiner Newcomb:

Q. As I understand it, the Diamond Anthracite Coal Company owns the property but have leased it to Mr. Thompson?

A. That is right. The Diamond Coal Company owns the property.

Examiner Newcomb: Any further questions, Mr. Riddle?

Mr. Riddle: Yes, sir, Mr. Examiner.

By Mr. Riddle:

Q. Do you claim to be an expert in the matter of analyses of coal or knowledge of coal?

A. I am not a chemist. I can read their charts that they put out, however.

[fol. 143] Q. You can read the charts and read the analyses. Are you acquainted with the different seams of coal in this state?

A. Only in a rather perfunctory manner.

Q. Would you know anthracite from semibituminous coal?

A. No, not by visual inspection I would not.

Q. Not by appearance?

A. No, sir.

Q. There is a marked differential even between the several classifications, even in appearance, is there not?

A. Some run one way and some the other. I have seen some very low grade stuff that was apparently harder than any of the other coal but nothing like as good.

Q. That is the exception, isn't it?

A. I don't know. I am not a coal expert.

Q. If you were judging, what would you say that was?

A. It might be coal and it might be asphalt. We occasionally get asphalt out in the west that looks like that.

Q. You know it is not asphalt, don't you?

A. No, I do not.

Q. You have had how much experience in coal?

A. I do not know it yet.

Q. If we introduce a witness that swears that this is [fol. 144] Pennsylvania anthracite, you would believe it then, wouldn't you?

A. I probably would.

Q. From the appearance can you tell whether this is west Kentucky coal or coal from Arkansas?

A. I don't know west Kentucky coal. I am not familiar with that at all.

Q. If both of these pieces and the other two pieces over there that you see on the table are from the Spadra field, then you don't recognize them, is such?

A. No, sir, I do not. I could not tell you whether they are Spadra coals or from any other place in the state.

Mr. Riddle: That is all.

Mr. Puterbaugh: Mr. Examiner, may I ask the witness some questions?

Examiner Newcomb: You may, Mr. Puterbaugh.

By Mr. Puterbaugh:

Q. Mr. Christian, the task of getting exempted is quite a formidable task. Will you mind stating what advantage you think the company that you are interested in will gain by being exempted?

A. I cannot say that it would get any particular advantage. My idea is this. I am unalterable opposed to going into anything under false pretenses. I believe that when we go in under this code, calling semi-anthracite coal bituminous coal, we are operating under false pretenses.

Q. There would be nothing under the code or the naming of minimum prices that would require you to misrepresent the coal, or rather your lessee to misrepresent the coal? Your coal has been sold for these many years as Arkansas anthracite, hasn't it?

A. It has.

Q. And the trade knows what it is and they know what to expect when they get Spadra coal, don't they?

A. Yes, that is true.

Q. You really would not be misrepresenting anything by shipping them Spadra coal when they ordered it, would you?

A. I do not know that I would, but we would be going in under and having a price arrangement based on a false assumption.

Q. Do you assume and imagine that the prices that the Bituminous Coal Commission will fix as a minimum are likely to be higher than you want to charge or that your lessee wants to charge?

A. I do not know what they will do.

Q. You must have some thought in it to go to the trouble of obtaining these figures which you are submitting and coming here to testify, to be exempted.

A. Mr. Puterbaugh, you know all thoughts are not based on dollars and cents.

[fol. 146] Q. Well, quite a percentage of them are.

A. I admit that. You are better prepared to speak on that than I am.

Q. However, do you mean to say that you are engaged in the coal industry from a philanthropic standpoint?

A. Well, it has been up to date.

Mr. Waldron: Mr. Examiner, Mr. Plein would like to ask a question of the witness.

Examiner Newcomb: Very well. Let the record show that these questions are being asked by Mr. Riddle.

By Mr. Riddle:

Q. Going back to this letter from Mr. Branner. On the second page here he has given us some analyses, which are taken from the United States Bureau of Mines, technical paper 416.

A. No. It is taken from I. C. 6933, isn't it?

Q. No. Technical paper 416.

A. Oh, yes. That is true, the analyses.

Q. This bulletin—

A. (Interrupting) Well, I don't know; I have not seen that.

Q. Now, these analyses here are selected analyses from Johnson County, in which the calculation works out to be semi-anthracite coal, according to Mr. Branner. There are four other analyses given in this publication for Johnson County, which he has not put in this letter.

[fol. 147] A. They might have come from the Philpot area out west.

Q. That is, they may not be semi-anthracite?

A. They may not be out of the Spadra field.

Q. These analyses that are given here, 2587, 2588, 3368, and 3407, in this technical paper 416, are referred to as being published in Bulletin 326 in 1922, which came out at least fifteen years ago—I am not positive of that—but it is a rather old publication. Therefore these analyses are old. Is it probable that the coal from which these samples were taken are now mined out?

A. No.

Q. Can we tie in in any way with this coal on which these analyses are based coal coming from the Sunshine Anthracite Company?

A. No, sir, I do not think so. We have had analyses made independently in years past from the coal in that field and we can find no material difference in the analyses, irrespective of the part of the field from which it comes.

Q. I was just trying to pick out what is given here in reference to the age of these analyses.

A. Well, there are some there apparently recent, I believe.

[fol. 148] Q. Yes. I will come to that now. This U. S. Geological Survey Bulletin 847-E gives us these analyses, which I know to be fairly recent—1934. In this other exhibit, Exhibit N, with reference to the classification code, which has just been introduced, Bureau of Mines Information Circular 6933, one of the physical properties that are needed for testing what we call a semi-anthracite was non-agglomerating.

A. Yes.

Q. Mr. Branner in this letter hasn't given us any tests as to whether these analyses are non-agglomerating?

A. No, there is nothing said in there about it.

Q. So, to use this test here we have to have that additional information for these analyses?

A. Well, of course we all know it is non-agglomerating, but we will have to get that from some other source.

Mr. Plein: That is all. One other thing, Mr. Examiner. Is it possible for us to examine these computations? I will assume that they are correct, but I would like to recall Mr. Christian later today or tomorrow morning, or whenever it is convenient.

Mr. Howard: Certainly.

Examiner Newcomb: Any further questions, Consumers' Counsel?

[fol. 149] By Mr. Machugh:

Q. Mr. Christian, do I understand you to say that you are the president and owner of the Diamond Anthracite Coal Company?

A. President and part owner.

Q. And part owner?

A. Yes, sir.

Q. Do you operate that mine at the present time?

A. It is being operated under a lease.

Q. To whom is it leased?

A. I don't know—three or four of them. Mr. Thompson is the head of it there.

Q. Could you get his name for the record, if you please?

A. Mr. E. N. Thompson.

Q. When was the mine leased to Mr. Thompson and his associates?

A. Two years ago.

Q. Prior to that time did you operate the mine?

A. Yes.

Q. For what period of time back to 1921?

A. Back to 1921.

Q. Do you know the annual production of that mine?

A. Well, it has varied. It has varied enormously.

Q. Are you able to give it for certain years—1936?

[fol. 150] A. One year we moved a thousand tons.

Q. What year was that?

A. I don't remember. It was the year that we agreed to maintain the prices with these other fellows, though, and they did not.

Q. What was the production in 1936?

A. In 1936, my recollection is about 23,000 tons.

Q. What was it the year before, do you know?

A. I don't remember.

Q. Where was the coal sold?

A. We sold most of it through the states of Minnesota, Iowa, Nebraska, Kansas, and some in Missouri.

Q. How much of it was sold outside of Arkansas?

A. Oh, probably ninety-eight percent.

Q. To what class of consumers was it sold?

A. It is domestic coal and it goes to the individuals in their homes.

Q. In those territories named above?

A. Yes, sir. Of course we sell through jobbers to retailers, who in turn retail it to the consumer.

Q. Would it be possible for you to name two or three representative consumers?

A. No.

Q. I understand you to say that you feel the coal of the [fol. 151] Sunshine Anthracite Coal Company should be exempted?

A. I think all the coal in that field should be exempted.

Q. Which includes—

A. (Interrupting) Which includes the Sunshine.

Q. (Continuing) —the Sunshine and the Diamond Anthracite Coal Company?

A. Well, all of them.

Q. Have you or Mr. Thompson filed an application for exemption on behalf of the Diamond Anthracite Coal Company?

A. I have not. I understand Mr. Thompson is going to file an application.

Q. But it has not been filed up to this time?

A. I do not think so.

Q. Do you know the total production of coal in Arkansas annually?

A. I do not.

Q. Do you know the total production of coal in the Spadra district?

A. No, excepting through hearsay.

Q. Are you able to estimate what it would be annually?

A. I beg your pardon.

Q. I say, are you able to estimate what it would be annually, in the Spadra district?

A. Last year, I imagine it ran in the neighborhood of 200,000 tons, but I would not be positive because I have no authentic information.

Q. Do you know whether the Diamond Anthracite Coal Company operates throughout the entire year, or do you know how many days approximately it operates throughout the entire year?

A. None of them operate throughout the entire year. They do not have the business. Their operating time is dependent wholly on the business that they get.

Q. The orders secured prior to the time the coal is mined?

A. You get no orders until about the time you start operating.

Q. Could you make that any more specific, as to a basis of percentage? For instance, when you were operating the Diamond Anthracite Coal Company, approximately how many days a year did it run, the last year you were there? Just an estimate, please.

A. Fifty or sixty days.

Q. Fifty or sixty days out of the year?

A. Out of the whole year.

Q. How much of that business was ordered prior to the time the coal was mined?

[fo]. 153] A. Of course, we had to have the orders before we mined it, but before we started operations I do not suppose we had over ten percent.

Mr. Machugh: Thank you, Mr. Christian. I believe those were all the questions I have at present, Mr. Examiner.

Examiner Newcomb: Mr. Fowler, did you care to ask Mr. Christian any questions? Any other interested party?

Mr. Puterbaugh: Mr. Examiner, I would like to ask Mr. Christian some questions.

Examiner Newcomb: You may, Mr. Puterbaugh.

By Mr. Puterbaugh:

Q. Mr. Christian, you have a shaft at your mine, do you not?

A. We have a shaft but we made a slope out of it.

Q. How deep was your shaft; vertically, how far down is it to your coal?

A. I don't remember. I think something like sixty or seventy feet.

Q. Wasn't your mine at the beginning a strip mine and then later you went down deeper and put in a shaft?

A. No. We stripped as far as we could. The overburden got so heavy that it was no longer profitable to strip and so we went underground, where we are mining the coal now. [fol. 154] We have probably two hundred feet of cover over it.

Q. You have an inside slope going down?

A. Yes, sir.

Q. Your interest at the present time is primarily in the royalty that you receive from your lessee, is it not?

A. Yes, that is true.

Q. And also are you not interested and one of the principal owners of the little short line railroad that serves your mine?

A. Yes.

Q. So you are interested in the volume of tonnage, aren't you?

A. Naturally.

Q. For the benefit of the railroad and for the benefit of the royalty?

A. Certainly.

Q. It doesn't make any difference to you particularly what the selling price of the coal is, provided it moves in volume?

A. It does because if we get it up too high you won't sell any, and if you get it down too low, they will go broke and won't do anything either.

Q. But as a royalty collector and as interested in the railroad spur, your direct interest is in the volume of movement of the coal?

A. Our interest is like yours at Russellville.

Mr. Puterbaugh: That is all.

By Mr. Machugh:

Q. Mr. Christian, may I ask what effect would the granting of an exemption to the Sunshine Anthracite Coal Company have upon the consumers of that company?

A. I cannot see where it would have any material effect.

Q. Whether it would be beneficial or not, are you able to state that, Mr. Christian?

A. No. I think they already have the prices down as low as they can possibly go anyway.

Q. It would have no effect at all?

A. I don't believe it would. It might have some but I am not enough of an economist to be able to figure it out.

Q. You are not able to give any specific answer than that?

A. No, sir.

Mr. Machugh: Thank you, Mr. Christian?

Examiner Newcomb: Any further questions? Thank you, Mr. Christian.

(Witness excused.)

Examiner Newcomb: You may proceed, Mr. Howard.

[fol. 156] Mr. Howard: I am reading from the latter part of our petition. (Reading)

"We quote from page 42 of the Keystone Coal Buyers Catalog and Mine Directory for the year 1932: 'Mining Districts of Arkansas-Spadra. Seam mined is the Hartshorne, known locally as the Spadra, and producing a semi-anthracite coal used for railroad, steam, domestic, and metallurgical purposes. Coal from this district is known to the trade as 'Arkansas anthracite.'"

"In the Spadra district, the coal is harder and lower in volatile matter, giving rise to the name 'Arkansas anthracite,' though in reality it is of the semianthracite rank. The larger sizes are used entirely for domestic purposes. The coal burns like Pennsylvania anthracite and just as satisfactorily, but it is not so hard and makes a little more slack and fine coal in transportation and handling. It is smokeless, burns with little flame, and maintains a fire for a long time with a strong steady heat. The slack is used as a reducing material in the retorts of the zinc smelters."

"Quoting from page 170 of the Keystone Coal Buyers Manual for 1936: 'Report of U. S. Coal Commission (Part

IV), page 2049—The Arkansas Anthracite field embraces semianthracite operations in Pope County and in the Spadra District in Johnson County.' ”

[fol. 157] E. N. THOMPSON, lessee of the Diamond Anthracite Coal Company, Clarksville, Arkansas, was duly sworn and testified as follows:

By Mr. Riddle:

Q. Mr. Thompson, have you accepted the code?

A. Under protest.

Q. I asked you the question, have you accepted it?

A. Under protest.

Q. Will you answer my question?

Mr. Howard: Why isn't that a fair answer to the question, Mr. Examiner?

Mr. Riddle: That is all.

Mr. Patterson: May I ask the witness with reference to that?

By Mr. Patterson:

Q. What was your answer to the Government's question?

A. Under protest.

By Mr. Riddle:

Q. Where is your protest filed?

A. With the code members in Washington.

Q. It is on file?

A. Yes, sir.

Q. When was it sent in?

A. Sent in when we joined the thing along about the last of July.

[fol. 158] By Mr. Patterson:

Q. I will ask you if it does not state right in the face of the petition you sent in that you reserved the right to protest?

A. Yes, sir.

By Mr. Riddle:

Q. Did you file it with the District Board too, as required?

A. I don't know whether it was filed under protest in the District Board, but we sent it to Washington.

Q. But you did not file any with the local board?

A. I don't believe so. There was only one thing when we signed this code.

Mr. Riddle: That is all.

By Mr. Machugh:

Q. Mr. Thompson, what are your initials?

A. E. N.

Q. You are at the present time the lessee of the Diamond Coal Company?

A. Yes, sir, with some others.

Q. Do you feel that your product is exempted from the Coal Act?

A. Why, sure.

Q. You feel that the coal of the Sunshine Anthracite Coal Company is?

[Fol. 159] A. Yes, sir.

Q. How long have you been a coal producer?

A. As far as producing, I have not had much to do with the producing. My job is mostly selling. I have been connected with this mine,—I sold this coal for Mr. Christian, and Mr. Evans since—well, I have been selling this coal since 1925, this Spadra anthracite coal.

Q. On behalf of the Diamond Anthracite Coal Company have you filed a petition for exemption?

A. Not yet. No, we have not yet.

Q. Do you intend to?

A. Yes, sir.

Q. Why have you not done so today?

A. Sir?

Q. Why have you not filed your petition?

A. Well, sir, I just got home Friday. I did not know anything about this until I got home, and we just have not got to it.

Q. But you do intend to file a petition for exemption?

A. Yes, sir.

Q. What was your production for last year?

A. I will say twenty-one or twenty-two thousand tons.

Q. And where was that sold, in what territory?

[fol. 160] A. It was sold in Minneapolis, some in Nebraska, a little in Iowa and a little in Missouri.

Q. What percentage of it—excuse me.

A. (Continuing) A little bit in Arkansas.

Q. What percentage of it was sold outside of Arkansas?

A. I imagine about ninety-eight per cent. I do not think there was over two per cent that goes to Arkansas.

Q. What will be the effect of granting an exemption to your company and to the Sunshine Anthracite Coal Company from the point of view of the consumer?

A. What will be the effect?

Q. Yes, if an exemption is granted to either of these companies or to all of the companies in the Spadra district?

A. To the consumer? I don't know what they think about it.

Q. What do you feel would be the reaction upon them?

A. Upon the consumers?

Q. Upon the consumers. On the consumers of Spadra coal?

A. I do not know.

Q. What do you think?

A. I do not think the consumer would care much what we call it if he uses it and likes it. He can call it most [fol. 161] anything.

Q. It is not what they call it but whether or not the exemption is granted. Suppose the exemption is granted. What effect do you feel that will have upon the consumers in Minnesota, Iowa, Missouri, and Arkansas?

A. It would not have any effect only in the way of a price.

Q. What will that effect be, in the way of prices?

A. What effect would that have on the consumer?

Q. Yes.

A. If you get the prices too high the consumer won't buy it.

Q. Will the effect of granting an exemption raise or lower the price to the consumer, in your opinion?

A. The present set-up on what they are recommending the price is so high that they won't buy it and I think it should be lower so the consumer will buy it.

Q. You think it will be beneficial to the consumer?

A. Sure, it will.

Q. If the exemption is granted?

A. Not the consumer but the retailers in Minneapolis told me last week that if they hold the prices at these pub-

lished prices that this Commission has recommended, that they would not buy this coal at all, that they would just [fol. 162] disregard it and go and take Pocahontas coal.

Mr. Puterbaugh: You speak of prices recommended by the Commission. If there is such a thing out, we want to know what it is.

Examiner Newcomb: You will have an opportunity to question Mr. Thompson in a few minutes. Please do not interrupt Consumers' Counsel now.

By Mr. Machugh:

Q. Can you state who that retailer was who gave you that information?

A. No, I could not just tell you who the retailer was.

Q. It was a retailer in Minneapolis?

A. In Minneapolis or St. Paul. I could not tell you which one it was. I just got back from up there. That is the "dope" they gave me.

Q. Have you anything to say with respect to the effect upon the consumer of the granting of an exemption or the denying of an exemption to either the Sunshine Coal Company, the Diamond Coal Company, or any other coal company in the Spadra district?

A. Oh, I do not suppose the consumer cares what we call it.

Q. I am not saying what they call it. I am saying as to the granting or withholding of an exemption.

A. I don't know. This is the way I understand it. I [fol. 163] don't know—the only way I see is, if they hold it under this Bituminous Act and we are forced to go to these prices that are recommended, they tell me they won't buy it.

Q. Whom do you mean?

A. The retailers in the Twin Cities.

Q. Was that more than one retailer?

A. Yes, several of them.

Q. Could you name them?

A. I cannot name them right offhand. I did not know that I was coming in here to be questioned on these things.

Q. You think that represents the point of view of other retailers and those of whom you spoke?

A. Yes.

Q. You think they correctly represent the point of view of consumers of Spadra coal?

A. I think so. I think so. They tell me they are waiting and if these prices that they are talking of in the Spadra field, on the Arkansas anthracite, are held up to, they do not aim to put a pound of it in their bins. They say, "We will just quit buying it and go back to Pocahontas."

Q. Can you elaborate on that or specify any more than you have already done?

[fol. 164] A. No, sir.

Mr. Machugh: That is all. Thank you.

By Mr. Puterbaugh:

Q. You say you are president of the Diamond Anthracite Coal Company?

A. No, sir. We have just got it leased.

Q. I beg your pardon.

A. We have just got it leased and are running it.

Q. What is the name of your operating company as lessee?

A. Diamond Anthracite Coal Company.

Q. Whom do you lease from?

A. Diamond Anthracite. They are incorporated.

Q. Did you accept the provisions of the Bituminous Coal Act for the lessee, Diamond Anthracite Coal Company?

A. Do you mean sign this thing?

Q. Yes.

A. I signed it under protest.

Q. About July 1937?

A. Yes, sir.

Q. Did you send a copy of that to the District Board Office in Fort Smith, as the order directed you to do?

A. I don't know. I guess I did. I don't remember now. I know I sent one to Washington.

[fol. 165] Q. At the same time, in July?

A. Yes, sir. I just sent one up here. I don't know. You ought to know.

Q. You have not filed a petition for exemption from the provisions of the Act as yet?

A. Not yet, but we are going to.

Q. Mr. Thompson, you spoke of the prices that you have encountered, as proposed by the Commission, in the Twin Cities. What are those prices proposed by the Commission?

A. Here they are.

Q. Will you just read them into the record, if you have them?

A. (Reading from pamphlet) Grate, $7\frac{1}{2} \times 5\frac{1}{2}$, \$4.85; furnace, $7 \times 2\frac{1}{2}$, \$5; egg, $5\frac{1}{2} \times 2\frac{1}{2}$, \$5.10; No. 4 nut, $2\frac{1}{2} \times 1\frac{1}{2}$, \$5.35; No. 1 nut, $1\frac{1}{2} \times \frac{7}{8}$, \$4.75.

Examiner Newcomb: Mr. Waldron, will you have the witness identify from what he is reading those figures? He stated they were the Commission's figures.

A. That is just a pamphlet I picked up.

Mr. Waldron: This is a pamphlet apparently published by the P. & M. Coal Company. That is the Pittsburgh & Midway Coal Mining Company of Kansas City, Missouri.

By Mr. Waldron:

[fol. 166] Q. Mr. Thompson, that is their price list of coal, isn't it?

A. Yes, sir. That is their coal prices and those are the prices recommended to the Commission as prices on the Spadra coal.

By Mr. Puterbaugh:

Q. Let me ask you, Mr. Thompson, this. I first understood you to say that these were the prices recommended by the Coal Commission?

A. Recommended to the Commission.

Q. By whom?

A. I don't know. Some of the Spadra operators.

Q. Some of the Spadra operators?

A. Yes.

Q. And that is your source of information, that circular advertisement of the Pittsburgh & Midway Coal Company?

A. The source of my information?

Q. Yes.

A. No. They will all tell you—there are some operators here. Put them on the stand. They will all tell you what they recommended. You know what they recommended.

Q. What other source of information have you in support of those prices you read there?

[fol. 167] A. They all told me that.

Q. Who?

A. Mr. Collier right there behind you. He is a member of your Board. Let him tell you what the prices are, what they recommended to the Board.

By Examiner Newcomb:

Q. Mr. Thompson, you have stated that those are prices the Commission recommended. Now, you say those are prices that some people have discussed. Then you have produced a circular that purports to be a circular published by some coal company. Now, which is correct?

A. The prices that they have recommended, the operators in that field have recommended to the Commission to be established.

Q. How do you know these operators recommended these prices?

A. They all told me so.

Q. Who told you so?

A. Mr. Collier.

Q. Who else?

A. Mr. Kemp.

Q. Who is Mr. Collier and who is Mr. Kemp?

A. Mr. Kemp is an operator in the Spadra field. Mr. Harding—I think he is back there. Of course, Mr. Puterbaugh.

[fol. 168] Q. Mr. Puterbaugh told you that?

A. No, sir, he did not tell me that. But that is the price they all agreed on.

Q. But these other men you have mentioned told you that those are the prices that they recommended?

A. Yes, sir.

By Mr. Puterbaugh:

Q. As a matter of fact, isn't this largely hearsay?

A. No, sir, it is not.

Q. And imagination?

A. No, sir, it is not.

Q. Have you seen any recommendation by the District Board to the Commission on prices for this district?

A. Why, they put the "dope" out.

Q. I am asking you if you have seen any official recommendation from the District Board of District No. 14 recommending prices for approval by the Commission?

A. No, sir, I have not seen it, no. I would not see it, naturally, by the Board, but those are the prices put out.

(A discussion was had off the record.)

Mr. Puterbaugh: Mr. Examiner, may I ask the witness a question?

Examiner Newcomb: Yes, you may, Mr. Puterbaugh.

By Mr. Puterbaugh:

[fol. 169] Q. Mr. Thompson, if the minimum prices fixed by the Bituminous Coal Commission were reasonable prices, considering the cost of production and competitive coal prices, would you then consider that there was any special advantage to be gained in being exempted?

A. I do not know as I would be, only it looks like it is not hardly fair to the coal field to call it a bituminous coal when we have always mined it under the impression that we were mining Arkansas anthracite down there.

Q. There is nothing in the Bituminous Coal Act that will require us to call this coal any different coal than we have called it in the past, is there?

A. I don't believe there is.

Q. At least we can call it Spadra coal?

A. Yes, sir.

Q. And that is what it is known as to the trade?

A. Yes, sir.

Q. I take it that this sensitiveness of conscience concerning any misrepresentation is a relatively new thing; the thing is, though, that you fear that the Commission might fix a price that would not enable you to produce and sell as much coal against your competitor as you feel that you should sell?

A. Well, if they fixed that price too high we would not [fol. 170] sell any coal.

Q. Has there not been really more anxiety that the Commission might not fix the minimum price high enough?

A. I could not say. I had not heard about anybody.

Q. The presumption is that they will not name the prices so high as to shut any coal out of the market? Don't you think that is a reasonable presumption?

A. I don't know. I have not heard of anybody complaining about them, being afraid of them getting them too low.

Q. Would you mind stating what prices you are quoting to the trade, invoicing the coal that you are now shipping?

A. Four and a half.

Q. Can you give them on all the sizes, that they might be compared with those prices you mentioned?

A. \$4.75 on egg and \$4.50 on grate.

Q. That is about fifty cents a ton less on several of the sizes there, as I recall?

A. Yes, about. Something like that, yes.

Q. Those are the prices that you would prefer to quote yourself?

A. Yes, sir.

Q. At this time?

[fol. 171] A. Yes, sir.

Q. And in order to be free to name prices from time to time, you want to be exempted?

A. No, not so much to be free to name prices from time to time, but to keep from getting that coal so high that it will stay in the ground. That is my idea.

Q. Yes, sir. You will concede, will you not, that there has been great difficulty in the Spadra field down there in maintaining any kind of uniform prices on coal of different sizes in that field?

A. There has been some, I guess, yes.

Q. There has been considerable, hasn't there?

A. Well, there has been some difficulty in maintaining one price for everybody.

Q. There have been a great many conferences and efforts to organize a common sales agency?

A. Yes, sir. There were several conferences to that effect this spring.

Q. There always have been one or two that would not go along and kept the thing stirred up?

A. Yes, sir.

Q. You do not feel that the stabilization that is aimed at by the Bituminous Coal Act would correct those evils that we have been laboring under down there?

A. Yes. If everybody had one price I think it would [fol. 172] help.

Q. It would at least be more equitable as between the operators and among the miners that work for the operators, wouldn't it?

A. Yes, I think so, if they did not get the price too high that they would not mine any coal. The trouble has been down there, Mr. Puterbaugh, and you know that, they have held those prices so high that that field got down to where they would run fifty days a year. That is just a starvation job. If we can lower those prices and run our mines more days, that is the only salvation I can see for the field—lower your prices and get more running time. At the same

time, when you get more running days you will reduce the cost of production.

Q. Doesn't it always follow that when you lower your price you get more running time?

A. It has with us since we have had that mine down there.

Q. Isn't it a fact that there is a very close competitive relation between the operators over at Paris and the operators over here in Sebastian County, and Spadra, and don't they fix their prices in proportion to what Spadra coal sells for?

A. I do not know anything about that. I do not have anything to do with those fields like you do, and I really [fol. 173] don't know anything about that.

Q. If one or two operators in the Spadra field could lower their prices fifty cents a ton below the others in the Spadra field, or if all operators in the Spadra field could lower their prices fifty or seventy-five cents a ton, without any similar reductions from the other mines in District 14, we could get some advantage, but if they all reduced we would not get any advantage, would we?

A. My idea is to hold that in line with the other coals, hold the prices down to where they will be in line with competitive coals that go into the different territories.

Q. You mean mostly the coals from District 14?

A. You take Minneapolis, the big competitive coal up there is Pocahontas.

Q. West Virginia smokeless?

A. Yes, sir.

Mr. Puterbaugh: That is all.

By Mr. Machugh:

Q. Mr. Thompson, you said they are keeping the prices so high now. Whom do you mean by "they"?

A. Well, these prices that are supposed to be the prices of somebody. Don't anybody seem to want to own them now. I don't know.

Mr. Machugh: Read the question and the answer.

[fol. 174] (The question and the answer were read by the reporter.)

By Mr. Machugh:

Q. What prices are they, Mr. Thompson?

A. They have been denying them. Here is what they are putting out (indicating).

Q. Are they the same prices to which you referred?

A. Yes, sir.

Q. They are in effect at the present time?

A. Well, they are published. I would not say that they are in effect.

Q. Why are they not in effect?

A. You know they hardly ever get the published prices. They just publish these prices and then they get them high and then they have got room to give a man a discount or undercut and let him have it.

By Mr. Puterbaugh:

Q. Whom do you refer to as having these prices?

A. Everybody.

Q. You are not asking for exemption on that subject either?

A. No, sir. I would go in with the bunch.

By Examiner Newcomb:

Q. Whom do you say these men are that told you the Commission fixed these prices—Mr. Kemp, Mr. Collier, and [fol. 175] who else?

A. The fact of the business is I was in a meeting down there in our field at Clarksville when they were talking these prices, setting these prices.

Q. Mr. Kemp, Mr. Collier, and who else?

A. I think Mr. Harding. I don't know whether Mr. McKinney was there or not, but Mr. Collier was and Mr. Kemp, if he is still here, and I think Mr. Puterbaugh was there.

Examiner Newcomb: Any further questions from this gentleman?

By Mr. Fowler:

Q. What is the difference between the tonnage now and in 1932?

A. I really do not know. I don't know what the tonnage was in 1932.

Q. How many days did they work in 1932?

A. I could not tell you. We have run this three years, 1933-4, 1934-5, and 1935-36. Those are the three years we had it. 1933-34 we ran a little better than five thousand tons; in 1933-34 or 1934-35 we ran a little better than thir-

teen thousand tons; 1935-36, a little better than twenty thousand tons.

Mr. Fowler: That is all.

Examiner Newcomb: Anything further of Mr. Thompson?

[fol. 176] By Mr. Bramlette:

Q. Mr. Thompson, how far is your mine located from the operations of the Sunshine Anthracite Coal Company?

A. Oh, I imagine on a line about three or three and one-half miles.

Q. Are you familiar with the coal produced in the Sunshine mine?

A. No, I have not paid any attention to it. The fact of the business is, it all looks alike to me.

Q. You spoke earlier in your testimony of the fact that you had been selling Spadra coal for a number of years before you went into operations?

A. Yes, sir.

Q. What Spadra coal were you selling?

A. I sold the old Ducks Nest coal and I sold the Warner-Dunlap, and then I sold this, went to selling this Diamond coal for Mr. Christian.

Q. Did you sell any for the Spadra Coal Company?

A. Oh, yes. Who is the Spadra Coal Company—Rajada? Yes, I sold some for them, a little one year.

Q. Did you sell any coal for them when they were known as the Spadra Coal Company, operating the Sunshine mine?

A. No.

Q. Then you are not familiar with the quality of the coal [fol. 177] produced by the old Sunshine mine?

A. No, sir.

Q. You are familiar with the Rajada?

A. No.

Q. You sold Rajada, didn't you?

A. Yes.

Q. You are somewhat familiar with it?

A. Yes.

Q. Is it comparable with the coal you are selling from the Diamond Anthracite Coal Company?

A. Yes. It is all pretty much alike only there may be a little more impurities in some coal than others. That is about all the difference. As far as that is concerned, you

can take a car of my coal and ship it to Minneapolis and a car of somebody else's and ship it up there and we could not go up there and pick out our cars.

Q. It is comparable in quality and preparation; they are mined from the same seam?

A. I don't know. I guess it is from the same seam. I don't know.

Examiner Newcomb: Any further questions of this witness? If not, that is all.

(Witness excused.)

Mr. Howard: Mr. Examiner, I will take the stand now.

[fol. 178] HUBERT E. HOWARD, President of the Sunshine Anthracite Coal Company, President of the Binkley Coal Company, Chicago, Illinois, was duly sworn and testified as follows:

Direct examination.

By Mr. Patterson:

Q. Do you have a statement to make, Mr. Howard?

A. Yes, sir.

Q. Go ahead and narrate it in your own words.

A. My name is Hubert E. Howard; I am President of the Sunshine Anthracite Coal Company and President of the Binkley Coal Company, sales agent for the Sunshine Anthracite Coal Company. This petition is made to the Commission because we believe that this coal is in fact a non-bituminous coal. It is above the grade of bituminous coal and will rank by the different formulas put out by the geologists and the different state universities either in the semi-anthracite or the anthracite class. We believe that the entire Spadra field should be so classified. This is not an attempt on our part to obtain an individual advantage. The coal for thirty years in the history of the field has been sold as an anthracite coal. We believe that we would stultify ourselves, after having sold it for a considerable period as anthracite, to attempt to classify ourselves now as bituminous coal. There is another angle to this application and [fol. 179] to our position which we believe any applicant who does not follow in our steps should give serious con-

sideration, and that is this. The Guffey-Vinson Coal Act sets up exemptions from the anti-trust acts, both federal and state. It gives the operators operating under that act the right to meet and to combine to fix prices. If for any reason you do not happen to be operating under that Act, then you have lost that blanket. If you do operate under that Act and sell your coal as bituminous and participate in the fixing of prices and subsequently the Department of Justice decides that this is not a bituminous coal, does not come within the purview of the National Coal Act, then I almost guarantee a conviction under the anti-trust acts for the actions you have taken, particularly in view of the record that you have made in the past of selling this coal as a semi-anthracite coal and anthracite coal, for the past thirty years.

Cross-examination.

By Mr. Puterbaugh:

Q. Are you through, Mr. Howard?

A. I am through.

Q. To raise the point of the effect of the anti-trust law as it applies to code members under this Act—

A. (Interrupting) Yes, sir.

Q. (Continuing) —as President of the Binkley Coal [Vol. 180] Company, do you operate mines in other districts than District 14?

A. Yes, sir.

Q. Are your companies operating in other districts code members under the Act?

A. Yes, sir.

Q. The same law applies, does it not?

A. I beg your pardon?

Q. The same law applies, the same danger exists?

A. Not a bit. We are producing bituminous coal in those other districts and properly come under the Act. Every other company that we operate was among the first to apply and accept code membership wherever we have produced bituminous, semibituminous or subbituminous coal.

Q. Then the danger you point out—

A. (Interrupting) Just the geological fact that this is an anthracite coal, not a bituminous coal, and does not come within the definition of the Act.

Q. Then the question turns upon whether it is bituminous, semibituminous or semi-anthracite, I mean?

A. That is the sole question that should be decided here. is the sole question that should be tried.

Examiner Newcomb: Has the General Solicitor's Counsel any questions?

By Mr. Riddle:

ol. 181] Q. The statement is made on the assumption that this is an anthracite coal and not a semibituminous coal? That is correct, isn't it?

A. The statement is made on the assumption that this coal does not come within the definition laid down under the Guffey-Vinson Act.

Q. That answers the question?

A. Yes, sir.

Q. If it should turn up that some geologists and some chemists have analyzed this coal as semibituminous, don't you think that you should be under the Act, Mr. Howard?

A. I will tell you my personal viewpoint, and that is this. That we should come in under this Act when the highest court to which we can take our appeal under a conviction for a violation of the anti-trust acts has determined that this coal does come within the Act. Then I believe that we could come in it. Otherwise I think the record is against us to such an extent that we should take no chances.

Q. Well, if it should be found by the Commission, by any substantial evidence, that this so-called Spadra field and other coals about which we have talked here today are really semibituminous coal under the latest analyses, then you would be under the Act?

ol. 182] A. No, sir, I do not believe that a finding by the Commission would be binding upon any court that would have jurisdiction over me in a prosecution under the anti-trust Act. Do you think so?

Q. Yes, sir. The law says any substantial evidence appealed from will stand.

A. I differ with you on that.

Mr. Riddle: That is all.

By Mr. Fowler:

Q. Mr. Howard, the company you represent is a member of the Arkansas-Oklahoma Coal Operators Association?

A. Yes, sir.

Q. They did agree to go along on the Guffey Bill; the Coal Operators and Miners organization jointly agreed to go along for the Guffey Bill?

A. I have no knowledge of that; I do not know.

Q. You have no knowledge of that?

A. No, sir.

Mr. Fowler; That is all.

By Mr. Machugh:

Q. Mr. Howard, may I ask with reference to these last two exhibits you entered in the record; are they in a different classification than the first group, all of which were photostats and had been previously submitted to the Commission? As to Exhibits M and N, they were not previously [fol. 183] submitted to the Commission? Is that right?

A. That is correct.

Q. For the purpose of clarifying the record, you are president of the Sunshine Coal Company?

A. Yes, sir.

Q. Which is an operating company and the petitioner in this case?

A. Yes, sir, that is correct.

Q. You are also president of the Binkley Coal Company, which is the sales agent for the Sunshine Coal?

A. Correct.

Q. Do you know what the production is of the Sunshine Coal Company, the 1936 annual production?

A. In the year 1936 it was 10,935 tons.

Q. Do you know the production for the Spadra field in 1936?

A. No, sir. I have an idea that it is roughly around two hundred thousand tons.

Q. Do you know the tonnage produced in Arkansas in 1936?

A. Roughly somewhere between one million three hundred thousand and one million four hundred thousand tons. That is just an estimate.

Q. How much of the coal produced by the Sunshine was [fol. 184] shipped out of Arkansas?

A. Practically the entire output.

Q. Ninety-eight per cent?

A. Yes, sir.

Q. Did that also apply as far as you know to the other Spadra operators?

A. So far as I know. I am not acquainted or familiar with the marketing end of it.

Q. And in what territory is the coal from the Sunshine Coal Company sold?

A. Through the northwest mainly.

Q. What, in your opinion, would be the effect upon the consumers of granting the exemption which you request in this proceeding?

A. Oh, beneficial, I suppose, to a certain extent. How far that would go, I do not know.

Q. Will you elaborate on that, to what extent and in what manner would it be beneficial?

A. Well, as production comes along, the modern methods of mining produce coal cheaper than the older methods of producing coal. In the past fifteen years there has been considerable advancement in the art of mining coal, and any mine that is modern as against any mine that has not kept itself modernized will produce coal cheaper than the older type mine. Now, to that extent the consumer would be benefited. [fol. 185] fitted.

Q. I am referring to how he will benefit by the granting of the exemption requested, not as to the progress made in the method of mining.

A. You are speaking of this specific exemption requested by the Sunshine Coal Company?

Q. Yes.

A. The mine is putting in a modern method of mining. Now to the extent of its small tonnage which it will produce, that tonnage can move on the market possibly at a less price than other competitive mines that have higher costs of production.

Q. You are speaking of the method of mining, whereas I want to know the effect of granting the exemption which you request in this instance. That is the question involved.

A. To that extent, if this mine is not under the restrictions of the Guffey Act, in which its prices are fixed at a level of all producing mines and in which an efficient mine, a low cost mine, is not allowed to fix a selling price, it will still return it a profit. To that extent the consumer, if this mine is exempted, would effect a savings.

Q. Are you able to give any other information as to any possible effect on the consumer by the granting or withholding of this exemption?

A. I think that covers the situation.

Q. Are you able to give the names of two or three representative consumers of the Sunshine Coal Company?

A. No, sir.

Q. Can you state what class or type of consumers Sunshine coal is sold to?

A. It moves into the domestic consumer through retailers, to the people who own their own homes and burn it in furnaces and base burners and so forth.

Q. You cannot give any names of typical consumers?

A. No, sir. We do not deal with them; we do not meet them.

Q. You do it all through retailers, is that right?

A. We do it all through retailers.

Mr. Machugh: I believe those are all the questions I have at present. Thank you, Mr. Howard.

By Mr. Fowler:

Q. Mr. Howard, you stated in your letter that this coal, that your coal burns just like anthracite coal from Pennsylvania?

A. In what letter?

Q. In what you read here. I understood you to say that it burns like the anthracite coal in Pennsylvania.

A. No. I was quoting from the Keystone Buyers catalog [fol. 187] on that, I believe.

Q. When you were reading some of that?

A. Yes, sir. That was a quotation.

Q. You said, "It burns like anthracite in Pennsylvania."

A. That is right.

Q. Does your coal smoke?

A. I don't know; I never burned any of it.

Q. Then you don't know much about your coal?

A. No, sir, I do not.

Mr. Fowler: That is all.

By Mr. Puterbaugh:

Q. Mr. Howard, there has been some anxiety expressed here by Mr. Thompson and by you that the prices which this Coal Commission might fix would be so high as to render your coal unmarketable. I wanted to ask you if it is not a fact that the law provides that the classes of coal shall be based on the weighted average of coal from a given district, and that no provision is included in those prices for profit?

The only thing that the Bituminous Coal Act undertakes to provide for or authorize this Bituminous Coal Commission to do is to name a minimum price that is based on the weighted average costs of coal from a given group. Is that right or not?

A. Mr. Puterbaugh, I have expressed no anxiety as to [fol. 188] that. Mr. Thompson may have. The only anxiety I expressed was with reference to the effect of the Anti-trust Act. I think you have made a statement of the effect of the Guffey-Vinson Act in the districts.

Q. Of the prices?

A. Of the prices, yes, sir, and the district in which it does and should operate. The prices are based upon a minimum price which will reflect the average weighted cost of the field in which that market area or price is established.

Q. Yes, sir.

A. That is correct.

Q. That would mean that the low cost half of a given group might sell at that minimum price, if they so chose, and make a little money, but the high cost half of that group could not afford to sell at that fixed price because they would be prohibited from getting a profit.

A. You draw your own conclusion from that.

Q. That is just a mathematical fact?

A. Just draw your own conclusions.

Q. Regarding this fear of the anti-trust laws. We have all been in the coal business a good many years and we have struggled through without establishing uniformity. I am sure you have in your other properties, possibly in these, [fol. 189] but if the Bituminous Coal Commission will take over the task which we have failed to accomplish and will establish a stable price in each district, then there would be no combination or no excuse for us to combine in restraint of trade or have any price understanding, do you think?

A. You do not understand, Mr. Puterbaugh. If you operate under this Act you are combining in restraint of trade, but the Act itself gives you protection. If you do not properly belong under the Act and do not come under the classification named by the Act, you haven't that blanket and you are acting in restraint of trade and in combination and conspiracy. Now, I do not believe that the Commission by its ruling that this law or this coal from the Spadra field is within the Act determines that legally at all. I do not believe the Commission's ruling as such would be binding on

any Federal Court. Generally it is not. You appeal from any ruling of the Commission to the Federal Court. Any Federal Court can reverse the ruling of the Commission.

Q. So far, however, the Commission comes nearer to being an authorized tribunal with respect to coal matters than anything else the Government has created except the courts?

A. Certainly, if you should clearly come within the terms [fol. 190] of the Act itself.

Q. If the Commission is within the terms?

A. If you are producing bituminous coal.

Q. But the point I am getting at is this. Suppose the Commission names a price of \$4.50 on Spadra coal, and suppose in obedience to what we believe to be the law we sell our Spadra coal at \$4.50, all of us sell at the same price. We have admitted that we have the same grade of coal. We go out in fair competition with one another at \$4.50. Are we violating the law in any particular there? Do you think there is any conspiracy in restraint of trade?

A. Absolutely, if you have a coal which does not come within the terms of the Act. Just follow your own steps. Before the Commission will set a price you will have to meet as a Board. You have met and you have discussed what our price will be. You take this price. It ought to be fair here. You have had meetings under the Guffey Act which are properly lawful and legal as to a bituminous coal, which, in my judgment, are unlawful and illegal when they deal with anthracite coal. You will act as a Board in concert to fix a price which is in violation of every anti-trust law on the statute books any place.

(A discussion was had off the record.)

Mr. Puterbaugh: That is all I have, Mr. Examiner.

[fol. 191] Mr. Machugh: May I ask Mr. Howard one question?

Examiner Newcomb: Yes, Mr. Machugh.

By Mr. Machugh:

Q. May I ask if your chief anxiety in the event of a failure to secure an exemption in this matter is a fear of possible prosecution under the anti-trust law?

A. That is a very grave concern.

Q. That is one of the principal ones?

A. Yes, sir. I think that that would overbalance everything else alone.

Q. I gathered that from the import of your testimony?

A. Yes, sir.

Q. I wanted to be certain that you at least placed great weight on that as a reason in seeking this exemption.

A. Very great weight.

By Mr. Bramlette:

Q. Mr. Howard, may I ask you one more question? You spoke of the possibilities through modern methods of mining, which I drew from your remark you were intending to apply to the mine known as the Sunshine Anthracite. Is that mine mechanized throughout?

A. I don't know. I am not an operating man.

Q. You are not familiar with that?

A. No, sir.

[fol. 192] Q. What is or what are the modern improvements and methods of mining that will enable you to reduce the cost of production, that will give the consumers the benefit of that?

A. All of them; electric haulage, hoisting belt operation, conveyors, modern machinery.

Q. In other words, that would mean increasing the production per man employed in and about the mines, would it not?

A. I don't know.

Q. Your conveyor and your electric hauling and such as that means mechanical appliances rather than man power, does it not?

A. In a general way, yes.

Mr. Bramlette: That is all.

Examiner Newcomb: Mr. Bramlette, there is a gentleman named F. M. Schull, who is vice president and general manager of the Sunshine Anthracite Coal Company, whom we can call as a witness. He can answer these operating questions.

Do you intend to put him on the stand, Mr. Howard?

Mr. Howard: No, sir.

Examiner Newcomb: Do you care to interrogate Mr. Schull on the operations at this time?

Mr. Puterbaugh: Not at this time.

[fol. 193] By Mr. Patterson:

Q. Mr. Howard, you stated that fear of prosecution was one of the greater concerns which prompted you to seek this exemption. That is not the only one, is it?

A. Oh, no. Oh, no.

Q. You say you have put some weight on that?

A. Yes, sir.

By Examiner Newcomb:

Q. What are some of the others, Mr. Howard?

A. Oh, the fact that this is a geological question and under all the formulas that we can ascertain or find this is really a semi-anthracite coal, and the fact that we have sold it for that over a period of years, or have sold it as that over a period of years.

Q. You do not believe that it could possibly be called a super-bituminous coal?

A. There is no geological rank of that kind to my knowledge.

Q. You can call it super-bituminous just as well as it has been called semibituminous?

A. Well, but this coal is and has been——

Q. (Interrupting) Do you think that would be a correct title; one would be as correct as the other?

A. No, I don't believe so.

Q. They say semibituminous and subbituminous?

A. Yes, sir. But where you have sold this coal as an [fol. 194] thracite coal, as semi-anthracite coal, and where the Government in all its specifications has called for semi-anthracite coal, where the Bureau of Mines, the Department of Commerce, where every known company and channel of trade has treated it as either anthracite or semi-anthracite——

Q. Would you say that this vein and geological condition down here is normal and very ordinary and comparable with the rest of the coal producing areas of the country or would you call it a geological eccentricity?

A. We have a better name for it in the coal business.

Q. Speak frankly; we want to know what they call it.

A. Well, they call those bastard veins.

Q. All right. Since you have called this a bastard vein, or it is commonly called that, isn't it true that there is something irregular about bastard veins being created?

A. Now, don't misunderstand me. I do not call this a bastard vein, Mr. Examiner. I don't know; I am not a geologist.

Q. Mr. Howard, you say it has been called, in the trade, a bastard vein?

A. No. I was speaking of that—you were trying to get an eccentric or a "sport" expression, and I say in the coal business we call it a bastard vein.

Q. No, I am not trying to make a "sport" expression [fol 195] of it at all, I was quite serious.

A. You use my term "sport" in the wrong sense. You spoke of it as being an eccentric vein or out of the usual.

Q. Yes, sir, something unusual.

A. And I applied the term you did to those veins in general in the coal business. I did not mean to infer that that necessarily was the case in the Spadra field.

Q. That is all right. They are regular, normal, veins in different coal producing areas, is that true?

A. Yes, sir.

Q. And some people have called this, because of its unusualness, not being natural or not being regular, a bastard vein? Isn't that true?

A. Well, when you say "some people," whom do you mean?

Q. You say "your trade"; whom do you mean when you say "your trade"?

A. I was speaking of eccentric veins in general, not of this specific Spadra vein. As to this particular vein, I do not know what people have called it. All I know is the evidence that I have introduced today.

Q. You said that it was called a bastard vein, in answer to my asking could it not be a geographical eccentricity.

[fol. 196] A. I think you misunderstood me. I said in the coal trade generally we have a name for such veins. We did not or I did not intend to—and I have tried to correct myself since—to apply that to the Spadra vein. I do not know anything about the Spadra vein. I am not a geological expert.

Q. Do you call the Spadra vein an ordinary condition or vein?

A. I am not familiar with the veins of coal in this country, in this district. I don't know what seam it comes from.

Q. You would not say it is usual or unusual?

A. No, sir, I don't know.

Q. And since you do not know, it may be an unusual type of coal or rank of coal?

A. I think it is an unusual type of coal.

Q. It may be a super-bituminous or semi-anthracite or some other peculiar rank?

A. Yes, sir.

Q. After all, coals have not all been definitely ranked? There are still some differences of opinion between geologists as to certain analyses of veins and also as to ranks of coal?

A. That is correct.

Q. You will agree with that?

[fol. 197] A. Yes, sir.

Q. The industry is not in absolute accord on it?

A. No, sir. But I have not yet heard before today the expression "super-bituminous." I have heard the grades anthracite, semi-anthracite, bituminous, semi-bituminous, subbituminous, and so on.

Q. I do not say that a super-bituminous grade exists, but I say it could possess certain super qualities?

A. There isn't any doubt but in certain characteristics it is above bituminous.

Examiner Newcomb: Mr. Patterson, there are certain pertinent issues in this case and questions of fact that you have entirely overlooked, and the Examiner would like to be enlightened and have them made a part of the record. The first is you have failed to give the exact legal description by metes and bounds, or other legal description, of the lands under which your coal lies; which you wish to be adjudicated.

Mr. Patterson: I think we will cover that in the map which we will introduce. I think we are in error on that. I think that should be supplemented.

Examiner Newcomb: I wanted to call that to your attention. When you are supplying that information, I believe you should also supply information as to whether you are the owner or are the party entitled to and in possession or [fol. 198] control of the coal and the lands sought to be adjudicated. You have overlooked that. You have filed your application for exemption in your petition but you have not shown any legal title or authority.

Mr. Patterson: I think that has been shown in the testimony. Mr. Gregory was asked whether or not they owned this coal or whether or not they operated under a lease.

Examiner Newcomb: I know, but there is nothing in evidence as an exhibit to show it. I would like to have the record show your corporate capacity or legal status.

Mr. Patterson: By exhibits?

Examiner Newcomb: Yes. What type of corporation you are, whether Arkansas, Maryland, Illinois, or what, and your corporate structure and your officers, all of which information is very important to us.

Mr. Patterson: Then, if the Examiner please, we will ask leave to introduce documents before this hearing is closed in connection with your suggestions.

Examiner Newcomb: Today is the 4th day of October. Will one week be sufficient?

Mr. Patterson: Yes, sir.

Examiner Newcomb: I suggest that you mail it to me in care of the National Bituminous Coal Commission, Washington, D. C.

Mr. Patterson: Yes, sir.

[fol. 199] Examiner Newcomb: Does anyone care to ask Mr. Howard any further questions? I understand that he is going to leave town tonight. If not, we thank you, Mr. Howard.

(Witness excused.)

Mr. Howard: If the Examiner please, that is our case.

Examiner Newcomb: Mr. Howard, do I understand that you are resting your case and leaving it in the hands of Mr. Patterson, your local counsel?

Mr. Fowler: Mr. Examiner, I would like to be excused because I have an appointment in Oklahoma City tomorrow morning.

Examiner Newcomb: Do you want to be sworn as a witness and make your statement now?

Mr. Fowler: I have nothing further to say. I believe I have said about all that is necessary.

Mr. Riddle: We would like to use Mr. Fowler as a witness and his statements are not in the record.

Mr. Howard: If the Examiner please, we have closed our case, reserving the right to introduce these technical documents as to our legal description, corporate entity, and so forth.

Examiner Newcomb: The Commission is ready to receive any further testimony.

Mr. Riddle: We will use Mr. Fowler, as a witness now.

[fol. 200] Examiner Newcomb: Be sworn, Mr. Fowler.

DAVID FOWLER, President of United Mine Workers of America, District 21, Muskogee, Oklahoma, was duly sworn and testified as follows:

Direct examination.

By Mr. Riddle:

Q. State your name.

A. David Fowler.

Q. Where do you reside?

A. Muskogee, Oklahoma. My home is in Scranton, Pennsylvania, but I am in charge of this district.

Q. What is your business?

A. President of the United Mine Workers of America.

Q. What district?

A. District 21, which takes in part of District 14 and 15 of the bituminous code.

Q. The states of Arkansas and Oklahoma?

A. The states of Arkansas and Oklahoma.

Q. How long have you been in the coal industry?

A. Since I was a boy nine years of age.

Q. You have grown up in it?

A. Yes, sir.

Q. You worked in the mines how long?

A. I worked in the mines thirty-five years—more than [fol. 201] that.

Q. In what different classes of coal?

A. I worked most of my time in the anthracite coal fields in Pennsylvania.

Q. Have you worked in the bituminous fields also?

A. I worked in some of the bituminous districts in Washington and in Western Pennsylvania and Ohio.

Q. Did you ever work in the Pocahontas district?

A. I worked up there as an organizer in the Pocahontas district.

Q. Have you had such an experience in coal and coal seams that by their appearance you can tell to what classification they belong?

A. Well, I can tell pretty well—not exactly, but I can tell whether—the difference between anthracite and bituminous and semibituminous.

Q. I wish you would look at these specimens here on the table, Mr. Fowler, and state to the Examiner whether any of these coals are anthracite or semi-anthracite.

A. Here is anthracite. (Referring to Commission's Exhibit 1.) Anthracite will cut. These coals (referring to Commission's Exhibits 2, 3, 4, 5, and 6) are all softer than the anthracite coal.

Q. And are they bituminous coals?

A. Yes, sir. There is very little anthracite in this. You [fol. 202] can grab this coal any way and it will never cut you but if you grab anthracite coal it will cut you.

Q. And you get black all over your hands when you grab that?

A. You get dirty, of course.

Q. This is almost stainless (referring to Commission's Exhibit 1)?

A. Yes, sir. With reference to the anthracite coal, they make a lot of ornamental things out of it, such as watch charms, ink stands, and things of that kind, cloaks—they can be made out of this; this coal here (referring to Commission's Exhibit 1) can be stacked for one year and loses very little of its strength.

By Mr. Waldron:

Q. You are now referring, in your last statement, to the anthracite coal?

A. Yes, sir.

By Mr. Riddle:

Q. It will not slack?

A. Very little slack at all. It crushes up into pea coal or whatever they crush it to; whatever size they crush it to it remains that size.

Q. The other coals you have there before you, you say that all of those are semibituminous?

A. They are either bituminous or semibituminous.

[fol. 203] By Mr. Waldron:

Q. Your last statement has reference to coals that have been introduced in evidence—no, I guess they have not been introduced or offered in evidence but only exhibited.

Mr. Howard: Are these going to be offered in evidence, Mr. Examiner?

Mr. Waldron: We are trying to get them identified.

Examiner Newcomb: They are just being presented for identification.

Mr. Howard: The witness is saying "this piece and that piece," and the record won't show what he is talking about.

By Mr. Riddle:

Q. There is no difference in the larger pieces and the smaller pieces, is there, in your judgment?

A. There is but very little.

Examiner Newcomb: Mr. Riddle, suppose you designate the anthracite coal as Exhibit 1 and the other coals as Exhibits 2, 3, 4, and so forth, so the record will show what you are speaking of. They are only presented now for identification but not introduced.

By Mr. Riddle:

Q. I will ask you, Mr. Fowler, what coal Exhibit 1 is, if you know?

A. Exhibit 1 is anthracite coal.

Q. Now, I will ask you to examine Exhibit No. 2. State what that is.

[fol. 204] A. To the best of my knowledge, Exhibit 2 is semi-anthracite or semibituminous.

Examiner Newcomb: Now, correct the record to be accurate.

A. Semibituminous.

By Mr. Riddle:

Q. I hand you Exhibit 3 and ask you, from your experience, to tell the Examiner what that is, what coal that is.

A. In my best judgment, that is bituminous.

Q. Tell the Examiner what Exhibit 4 is, what coal that is.

A. Well, I have seen coal over here and it looks like Sunshine.

Q. Would you say that was bituminous?

A. Yes, sir, smokeless.

Q. And Exhibit No. 5.

A. Semibituminous.

Q. Exhibit 6?

A. Semibituminous.

Q. Is there any semi-anthracite in either of these exhibits?

A. I would not class any of this coal as semi-anthracite because I know for a fact that when they opened up the districts down here that those that were interested in it from [fol. 205] Scranton, Pennsylvania, just put a nickname on this bastard coal. That is all they did. It is an illegitimate child.

Q. Born out of wedlock, is that right?

A. Yes, sir.

Q. Is that what you mean?

A. Yes, sir.

Q. Now, this coal (Exhibit 1), you say is anthracite coal?

A. That is anthracite coal; no doubt about it.

Q. The others (referring to Exhibits 2, 3, 4, 5, and 6) are either semibituminous or bituminous. That is correct, isn't it?

A. Yes, sir.

Q. You had some conversation with Mr. Gregory, who was on the stand this morning?

A. Yes. I met Mr. Gregory while I was lying in the Research Hospital.

Q. Just tell what your conversations with Mr. Gregory were, Mr. Gregory being the agent of this company.

A. There was a question of wage rates or a dispute regarding the wage rates between there and the Paris field and they refused to comply with the wage agreement as signed in accordance with the Paris rate. When the agreement was made in 1935 there was no mention made of an- [fol. 206] thracite coal. No mention was made of it in any agreement.

Q. That was under the invalidated Guffey Act?

A. Well, that was right after that, yes.

Q. Proceed.

A. Then we had a rate there in the Paris field that when coal was over two ten, it was the line of demarcation. Then twenty cents extra per day was paid in wages. The coal in the Spadra field was more than two ten in the Sunshine mine and they came under the high rate, and they refused to pay the high rate. The case was then referred to a referee from Indiana, Mr. Cartwright. At that meeting Mr. Courtney was present, although he said that he was somewhat interested indirectly in the Sunshine mine. I presented my brief to the umpire and Mr. Johnson on behalf of the Sunshine Coal Company presented his brief to the umpire, and

the umpire decided in favor of the United Mine Workers of America, that their contract was based exactly on the Paris-Arkansas field. It had no connection with the Spadra contract at all.

Q. Was there any conversation had about the classification of the—

A. (Interrupting) Never any mention of the classification of coal.

Q. Was there any claim that there was any anthracite coal in Arkansas?

[fol. 207] A. No claim whatever.

Q. When was the first that you ever heard that there was a claim being made that there was some anthracite coal in the state of Arkansas?

A. The first claim I heard of was when I attended a board meeting of the code.

Q. Under the last Act?

A. Yes, sir. We discussed it then. I notified the board then that I believe there was a decision rendered by the previous board, and a decision had been rendered by the previous Guffey law board that it was in this bituminous hearing. In fact, there was no mention while we were on record—the Arkansas operators and the mine workers unanimously adopted a resolution sending Mr. Stewart and I to Washington, and we contacted the senators and the representatives and proved to them by letter, which can be produced, that the operators and miners unanimously were in favor of the Guffey bill, because it was of benefit to them, and the Binkley Coal Company under the Sunshine Coal Company was a member of that party.

Q. Then it was agreed—not agreed, but the board did adopt a resolution that all the coals in Arkansas and Oklahoma were bituminous coals?

A. The joint board of the miners and operators—not the code board, but the joint board of miners and operators. In [fol. 208] fact there was no mention of any other coal during the hearings on the Guffey law. The only ones exempted from the Guffey law was the anthracite Pennsylvania coal.

Examiner Newcomb: And lignite.

By Mr. Riddle:

Q. You spoke of some further conversation with Mr. Gregory. You asked him about it this morning and he did

not seem to remember it. What was your conversation at the hospital, that you spoke about this morning?

A. Well, the conversation that Mr. Gregory and I had was that he believed himself, personally, that although he was not running the mine at that time that there should not be no squabble about it and that we were all working under the same agreement and the same field and it ought to be paid.

Q. And that agreement was reached on what dispute?

A. On the question of the Paris scale. And this is what it was agreed on. (Reading)

"Section 1. Detail rules and wage rates governing all mines in Arkansas coal fields. (a) When conveyor and scow lines and other mechanical devices are installed in the Arkansas coal fields, the provisions of Articles 4 and 5 of the General Agreement, and the rules and day wage basis as now applied in the Paris, Arkansas, field detail contract [fol. 209] shall be the basis for adjusting the day wage rates."

Q. That is, adjusted on the basis of bituminous coal mining?

A. The contract was reached upon the selling prices and the freight rates and everything taken into consideration as bituminous coal.

Q. And what at that time would have been the difference between the wages paid anthracite coal miners and Pennsylvania and miners paid here if it should have been determined that there was any anthracite in the state of Arkansas?

A. At that time the wages would have been a difference of about three dollars a day. They were paying, in 1932, as low as two dollars for any limited number of hours, and now they work for five dollars, seven hours per day. And at that time the anthracite miners were averaging more than six dollars a day, while the miners in the same Sunshine mine were averaging \$3.75. Later, when the 1935 contract went on, it was increased.

Q. Have you anything further to add to what you have already said?

A. The only thing, I will say that I have worked in the anthracite coal mines from a slate picker in the breakers, when I was nine years old, until I left for the Army in

[fol. 210] 1898, and in picking the slate, crushing the coal, it is entirely a different class of operation to what this is. In the first place, the coal comes out in large chunks and it is crushed up. It is divided by screens and treated by small boys at that time picking slate out from the coal. And it is coal that naturally adheres—

Q. (Interrupting) That is anthracite coal that you are speaking of?

A. That is anthracite coal. And the only time they ever were able to see any blackness in that coal was when it was mixed with washer coal that sold for sixty cents a ton, and they mixed it with the true coal that we have in the anthracite field. There is a vast difference. You could not run a pick into the anthracite coal. You could not pick that coal at all. It will bounce off like a hammer. You can run a pick into any of this coal.

Q. Any of these specimens?

A. Yes, sir. You can put a pick into any of them. And the anthracite coal, it never smokes. There is no smoke coming from the anthracite coal. You can go into New York City, go into Philadelphia, to Washington—everybody burns anthracite coal and you do not see no smoke. But if you would burn this coal that comes from Spadra, you would not see the sun, in New York. So that is an absolute proof that it is bituminous. If they burned the same amount of [fol. 211] coal in New York from the Spadra field as they do from the anthracite field, I dare say you would not see the sun in New York City.

Q. You have been to most of these mines in this state, have you, Mr. Fowler?

A. Yes, sir, I have been around most all of them.

Q. Have you ever been to this particular mine?

A. No, sir, not right at that mine.

Q. Have you been about in that field?

A. Yes, I have been up and down there for the last seven years.

Q. From your knowledge as a miner and as president of the Mine Workers and mixing and mingling with coal men, would you say that there is or is not any anthracite coal in this state?

A. There is no resemblance to anthracite. It is merely a nickname that has been put on that coal. There is no resemblance to anthracite.

Q. And there is no resemblance in physical character, physical make-up or break-up or anything else?

A. Not a bit.

Q. Burning or anything else?

A. In the first place, let me say this, and I have seen miners come from this territory. You cannot find ten miners that come from this territory that can go into the [fol. 212] anthracite field and mine. They just do not know how to mine coal in that field. The anthracite miner can come down here and mine on a solid shooting basis. He is never an expert with a pick. When the mines were opened here many of our people came from the anthracite coal field down into this territory, and in order to keep the boys feeling good they called it anthracite, and it has been going under that nickname ever since.

Q. Do you have anything further to say?

A. Only to clarify this, that when I asked a question this morning about rates: I want to say here, for the record, that in the mines of the Smokeless Coal Company, and they call it the Smokeless Coal Company, the Blue Blaze Coal Company, the Harding Coal Company, Collier-Dunlap, Sterling Coal Company, Rajada Coal Company, the price is \$1.16 a ton for mining.

Q. What field are those mines in?

A. That is in the Spadra, Clarksville, field. In the two mines that they put into the record here today, the D. A. McKinney and the Diamond Anthracite, the same price prevails—\$1.16 a ton—exactly. This rate came about because for years the north crop, where these mines are located, had never been organized, and for the last four or five years under contract they were given a differential over and above [fol. 213] the mines in the south of them, which is called the main line. That differential was given to take care, at that time, of a little spur or branch of a railroad that was going up there. In the last contract we leveled the two districts up. We increased the main line seven cents a ton and we increased the north crop eleven cents a ton, in order to uniform the rate in that territory and in order to balance the competitive relationship of the two groups. That was done for that purpose.

By Examiner Newcomb:

Q. Mr. Fowler, are you going to introduce in evidence a copy of that book you were reading from?

A.CI was introducing this for the benefit of the Commission, as evidence to show that the contract is based entirely upon the bituminous wage agreement settled not only here but in New York. Our main structure of the contract was agreed upon in New York City; and in order to prove that they have considered this as under the bituminous contract, that they were a party to passing the Guffey Coal law and that they have accepted the rates and the prices as set forth in this agreement.

Q. That is for the mining of all coals in the state of Arkansas?

A. That is for the mining of all coals in the states of Arkansas and Oklahoma.

[fol. 214] By Mr. Machugh:

Q. Mr. Fowler, what is the date of that agreement?

A. This contract was signed on May 8, 1937, and expires March 31, 1939.

By Examiner Newcomb: *

Q. Mr. Fowler, will you state for the record certain page references that you were reading from in that book?

A. Yes. I refer to Article 49, Section 1, on page 56; Article 50, page 57; Article 51, page 60, 61 and 62 and 63; Article 52, Section 1, page 64, 65, and 66; Article 53, pages 67 and 68, and Section 2, page 69, page 70; Article 54, Section 1, pages 71 and 72, and Section 2, pages 73, 74, and part of 75.

Mr. Riddle: Now, we offer in evidence this Exhibit 7. We want to offer in evidence the pages and Articles that have just been testified about in Exhibit 7. We do not want to put this whole book in evidence unless you want it in.

Examiner Newcomb: Let the whole book go in, but make reference to the pages in the transcript.

Mr. Riddle: Then we offer in evidence Commission's Exhibit No. 7.

Examiner Newcomb: So admitted.

(Contract between Arkansas and Oklahoma Coal Operators Association and United Mine Workers of America, District No. 21, entered into on the 8th day of May 1937. [fol. 215] was marked for identification as "Commission's Exhibit 7," and was received in evidence.)

By Examiner Newcomb:

Q. Mr. Fowler, will you explain in detail the difference in mining methods in Pennsylvania anthracite fields and the Arkansas fields in general here, that has been commonly called Arkansas anthracite and semi-anthracite; and when you state the methods will you also state the differences for the record, please?

A. Yes, sir. The anthracite coal field, they generally shoot from the solid. The coal is all shot and the miners shoot their own coal.

Q. Mr. Fowler, for the record, when you use those technical terms such as "shooting," will you use terms so that if a layman or some one else is reading the record they will know exactly what you mean?

A. In shooting coal each miner is a certificated miner in the anthracite coal field. He is a qualified miner under the laws of the state and he is responsible for his work on the place and the man that labors under him, a coal loader, and he shoots his own coal; he drills his own holes and he shoots his own holes.

By Mr. Machugh:

Q. What does "shooting" mean?

A. Shooting the hole, they drill a hole in the coal and [fol. 216] the miner uses his best judgment in shooting that coal out.

Q. He drills it to shoot it?

A. With black powder.

(A discussion was had off the record.)

The Witness: You have asked for the difference. As shown, in the bituminous coal fields, they use an auger. That process would never drill a hole in the anthracite field. They have a regular anthracite machine, which has a screw and bits, and sometimes in the anthracite, in the Diamond or in the China veins, Dunmoore seams, it sometimes takes two men to pull on that machine to drill a hole, whereas here they take a press-auger and they just churn that hole in no time. You could not drill any hole with an auger in anthracite coal. You could not drill it.

By Examiner Newcomb:

Q. How about semi-anthracite coal?

A. Semibituminous, you can. There are some seams of semibituminous that have streaks of sulphur.

By Mr. Howard:

Q. Are you talking about semi-anthracite or semi-bituminous?

A. Semibituminous, I said.

Q. The Examiner asked you something about semi-an-
[fol. 217] thracite?

A. I don't believe there is any such an animal as semi-anthracite. I never seen it.

By Examiner Newcomb:

Q. You have heard it called Arkansas semi-anthracite?

A. Yes, sir. I believe I stated why—because they nicknamed it. In other words, it was well stated by Mr. Howard that it was a bastard, and it almost takes one to drill it. It is a hard thing to drill. There are several different methods of mining in the anthracite field. Some of our coal pitches from forty-five to eighty degrees and some of it is worked on the level. Some of our coal runs from twenty-eight inches to one hundred and ten feet thick.

By Mr. Riddle:

Q. Whose coal is "ours"; make that clear.

A. The anthracite coal.

Q. In Pennsylvania?

A. Yes, sir, in Pennsylvania. I still believe I am working there. It is entirely different work in the China seams, and the anthracite, the hardness of it. We have different grades of it. Some is hard and some is softer. In the low seams, called the China veins, the machines that they use here to drill would bounce off of it, would not touch it, they would fail to drill it.

Q. Could they cut this anthracite in Pennsylvania with
[fol. 218] these mining machines?

A. No, sir. They have to have an improved machine over there. They can cut in the bituminous vein or they can cut in the surface veins. They are of softer nature, but when you get down to the China seam it gets harder as you go down. We have eleven seams of coal.

Mr. Howard: Mr. Examiner, for the purpose of the record we are perfectly willing to admit that they mine coal differently in Pennsylvania, in the anthracite field, than they do in Arkansas, no matter what the seam. I would

like to save time, if I may, but I have not succeeded in doing it.

The Witness: He asked me to explain that.

By Examiner Newcomb:

Q. The wage scale that is existing now, is that based on bituminous scale or an anthracite scale?

A. Based upon the bituminous scale, with proper differentials worked out in this district.

Q. That is, for the entire mining operations of Arkansas and Oklahoma?

A. Yes, sir.

Q: Are there any wages paid here for anthracite mining?

A. No, sir. There is no mention of it in any of our agreements.

[fol. 219] By Mr. Riddle:

Q. Now, you said you began mining at nine years of age?

A. I picked slate in the breakers at nine and I drove mules at ten years of age.

Q. You failed to state how old you are.

A. I am sixty years old now.

Q. You did not finish on the differentiation between the mining of the anthracite coal and this coal that we have displayed here on this table.

A. I do not know as you could have an anthracite miner come down here to mine because our miners are more like ground hogs down here in Arkansas. You can imagine a man going in and working on his stomach all day long in eighteen or twenty inches of coal. Miners in the anthracite field are standing up in twenty feet of coal and in ten feet of coal. The men here crawl into their mines. Why, anyone in the anthracite field would say it was impossible to mine eighteen inches of coal, but they do mine it here.

Q. With reference to the machinery, can they mine this coal—

A. (Interrupting:) Let me finish my statement there, Mr. Riddle.

Q. Yes.

[fol. 220] A. What I am trying to get at there, you could not mine anthracite coal at eighteen inches without blasting. It would not come out of there. If you blast that anthracite coal, ninety percent of that coal would be blown into unmarketable sizes and it would not pay with the price of anthracite coal.

By Mr. Puterbaugh:

Q. You do not want to give the impression that all of the coal in Arkansas is eighteen inches thick, do you?

A. No, sir. I am referring to the Paris seam, where this price structure is fixed for the Sunshine Coal Company.

Q. You mean the wage structure?

A. The wage structure is based absolutely on the Paris scale.

By Examiner Newcomb:

Q. Is that specified in the Spadra field too?

A. No, sir, not all the Spadra field. Just the Sunshine Coal Company.

By Mr. Puterbaugh:

Q. How thick is the coal in the Spadra field, Johnson County?

A. Anywhere from eighteen inches to twenty-two inches.

Q. Over in the Spadra field?

[fol. 221] A. No, I mean in the—

Q. (Interrupting.) In the Paris field it is from eighteen to twenty-two inches?

A. Yes, sir.

Q. That is "long wall" mining?

A. Yes, sir.

Q. Over in Johnson County, where the Sunshine and McKinney mines are located, the coal there is—

A. (Interrupting.) It runs in there two foot ten and over.

Q. Yes, sir, but up here in Sebastian County it runs four and five feet, don't it?

A. Yes, sir, in some places. Yes, sir.

By Examiner Newcomb:

Q. This Paris wage scale you are speaking of is also effective in the Sunshine operations, is it not?

A. The Paris scale, yes, sir. Let me just clear that matter up. In the last working agreement, due to the fact that the line of demarcation in the height of the coal placed the Sunshine Coal Company at a disadvantage to their competitor in the Paris field, we changed that contract, which was signed only a few months ago—we changed that con-

tract in the number of tons produced and we placed the line of demarcation for the change of the wage rates. The line of demarcation for changing the wage rate was based upon the [fol. 222] number of tons instead of the number of feet and inches of coal. And that was agreed to by the Sunshine Coal Company in accepting the Paris-Arkansas mining contract. The Sunshine Spadra Coal Company is the only one in the Spadra field that has that working agreement.

Examiner Newcomb: Mr. Howard, did you wish to interrogate Mr. Fowler?

Mr. Howard: Yes, if the Examiner please.

Cross-examination.

By Mr. Howard:

Q. You spoke of your visit to Mr. Gregory.

A. I did not visit him. He visited me. I was there with a broken leg.

Q. Yes, sir. At that time what did he say his position was in connection with the Sunshine Anthracite Coal Company?

A. Well, he did not say that he had anything to do with it, but quietly he came to me—

Q. (Interrupting.) As a friend of Mr. Johnson?

A. As a friend of Mr. Johnson.

Q. That is the only capacity he was in; he was not then an officer of the Sunshine Anthracite Coal Company, was he?

A. He wanted to know the facts in the case, and if you [fol. 223] want me to spill them, I will, but I do not think it would be of any benefit to anybody here for me to tell that here.

Q. The question that I have asked you was the capacity that he went there in.

A. You know, I have been trying to find that out myself because when they went out with the referee the old man was laying there with his leg broke, and the referee and they all went out together and I did not know how I was going to come out in that case.

Q. Mr. Johnson was president of the Sunshine Company, was he not?

A. I do not know. He was getting the dough from the Binkley Coal Company. I know that.

Q. He was president of the company, was he not?

A. I don't know whether he was president or whether he was just a "maker" over there. He acted as if he was just under your rulings. That is the way he acted to me. But I do know that when I told Mr. Gregory at that time—I says, "Do you want the facts in the case?" He says, "Yes. We are vitally interested because we furnished the dough."

Q. That is right. We would be if we furnished the money.

A. Yes. I says, "I will tell you this. You can agree here [fol. 224] today but I will bet you ten dollars you cannot operate your mine. The strike in the Sunshine mine was called and was provoked by the operator because he could not operate any more." He had gone as far as he could and I put him wise to that and he went down, and I believe he will appreciate that I told him the facts in the case.

Q. All right. In your judgment there is no semi-anthracite coal?

A. Not down here. I never knew of any semi-anthracite.

Q. Any place?

A. There was some away up in Connecticut or some place.

Q. Did you ever see any of it?

A. No, sir. It was harder than the Pennsylvania anthracite. It was so hard you could not drill it.

Q. But there is an existing semi-anthracite?

A. Up in Connecticut there.

Q. Did you ever see any?

A. No, sir, but I have talked to men that came back from there who have said they could not drill it, that it was too hard.

Q. Your testimony here today is based on the fact that in your judgment there is no semi-anthracite?

A. I do not believe there is any.

[fol. 225] Q. What is the difference between anthracite and bituminous coal?

A. In the first place, there is no smoke comes from the anthracite coal, not a bit.

Q. What is the difference?

A. There is just a little blue blaze. From bituminous coal there is smoke.

Q. What is the difference in volatile matter?

A. The difference in volatile matter?

Q. What is the difference in volatile matter between the two coals?

A. Oh, I am not any expert on that.

Q. As far as you know, your judgment as to anthracite or bituminous is based upon its appearance and upon how it burns?

A. Yes. My only object here is to prove, if I can, to the Commission, that this is not anthracite coal.

Q. Could you tell that by the way it looks?

A. I can tell by the way it looks and by the way it feels and by the way it smokes.

Q. You have not seen any of this coal burn, have you?

A. Oh, yes. That is why I asked you and you said you did not know whether it smoked or not.

Q. I mean the exhibits here today.

[fol. 226] A. Not those pieces. We can burn them, however, and I will bet you the drinks that they will smoke.

Q. Referring to your contract, you say this contract is based on the bituminous scale?

A. Yes, sir.

Q. And has nothing to do with anthracite coal?

A. Not a thing.

Q. Will you point to any place in that contract where it mentions the words "bituminous" or "anthracite" other than the name of the company?

A. It does not have to say that.

Q. Show me any place where it says "bituminous" or "anthracite".

A. It does not say that, no. I do not believe it contains that in your Indiana contract either, and there are a lot of bituminous contracts. That is between the Operators' Association and the Mine Workers. There is no such thing in a lot of them; did not need to be mentioned there, but if you will go back to the general agreement—

Q. (Interrupting.) Oh, no.

A. You are asking me to answer your question. Now do not answer your own question but let me answer it. We are a part of the same contract that you are in Indiana. The Pocahontas field became the wage base of all of the industry. At one time Illinois, Indiana, Pennsylvania, and Ohio [fol. 227] was the wage base, but we all agreed, and you will remember that, that we would allow the Pocahontas field to be the basic point, and then we all accepted that in New York, both Indiana and all of the districts. Every district in the bituminous fields accepted that wage advance, and we were instructed to go home and make contracts with our districts with that as the basic point of settlement, and

that is what was done, and the only change that was made in it was in the Sunshine Coal Company over there in the Spadra field.

Q. That is correct.

A. Yes, that is correct.

Q. But just assume that somebody had been producing an anthracite or semi-anthracite coal in Indiana, Illinois, or any place else in competition with adjoining mines who were working in bituminous coal. They would have carried the same wage scale, wouldn't they?

A. I don't know. It would all depend on the competitive relationship.

Q. That is just what I am getting at.

A. Yes, sir. That is natural.

Q. The mere fact that the Sunshine rate was based on the Spadra or on the Paris field rate really has no bearing on whether the Spadra coal is anthracite or bituminous, has it?

[fol. 228] A. Oh, yes, it has in this case. By the joint action of the miners and operators in this field in joint session, they agreed to notify all the miners and all of the operators affiliated with both organizations that any violation of the Guffey law or violation of the agreement would deprive them of a certain section within this contract. That company was notified.

Q. Surely.

A. Yes. You were a party to it all the way through.

Q. Providing they were producing bituminous coal.

A. Did not say anything about bituminous coal at all.

Q. The law did.

A. Did not say anything at all. That was a joint action of the miners and operators in joint conference.

Examiner Newcomb: Anything further?

Mr. Howard: No further questions.

Mr. Puterbaugh: Mr. Examiner, may I ask the witness a question?

Examiner Newcomb: Yes.

By Mr. Puterbaugh:

Q. Mr. Fowler, there are large bituminous mines in Pennsylvania as well as large anthracite mines in Pennsylvania?

A. Oh, yes.

[fol. 229] Q. Is there any relationship in their wage scale? One is not based on the other, is it?

A. No, sir, no relationship whatever.

Q. As far as the United Mine Workers organization is concerned, are there not just two groups in the country, the bituminous group and the anthracite group in Pennsylvania?

A. There are three anthracite districts. Districts No. 1, 7, and 9. The rest of them are all bituminous.

Q. You negotiate your anthracite wage scales at one time, maybe one year, and the bituminous contracts with all the other mines in the country outside of Pennsylvania at another time?

A. Separate contracts entirely.

Q. That has been the rule for how many years?

A. For forty years.

Q. And there is no adjustment of one based on the other?

A. No, sir.

Q. The anthracite is a separate and distinct class?

A. Yes, sir.

Q. And all the rest of the mines are bituminous?

A. I have been in wage conferences in both bituminous and anthracite. I served on the wage scale committee in the anthracite coal field and the anthracite operators would [fol. 230] never permit any interference from the bituminous coal operators whatever. They were separate and apart. And the bituminous operators were just as strong against them.

Q. Have the United Mine Workers ever recognized any coal outside of Pennsylvania as anthracite?

A. Never.

By Mr. Howard:

Q. That would make it bituminous, if they had not recognized it, would it?

A. It has been considered as bituminous. All of us fellows believe that when it smokes it is bituminous.

By Mr. Machugh:

Q. Mr. Fowler, what would be the effect, in your opinion, upon the consumers of the granting of an exemption to the Sunshine Anthracite Coal Company of the request in this proceeding?

A. It would mean an increase in the cost of coal to the consumer because under the wage contract it provides that

a committee of operators and miners will set the differential, and if the Commission would grant a lower rate for the Sunshine and others on anthracite, we would then ask for a reopening of the wage scale and demand an anthracite agreement, if that was the decision.

Mr. Howard: That is O. K.

A. (Continuing:) And we would soak you six or seven [fol. 231] dollars. But that would mean that the consumer would then be charged more for his coal. They would have to increase their price of coal to meet that wage demand.

By Mr. Machugh:

Q. And your answer would be the same with respect to a similar petition by any other Spadra coal producer?

A. Yes, sir. It is going to increase the cost because then they will cut down the argument about differentials. The reason there is a seventy-five-cent differential is because of the fact that they sell their coal for a certain price. If they are going to give that differential away to the consumer or to the distributor, then the miners are going to step in and demand their rights. We are not going to grant seventy-five cents differential and then have it given away to some one else. Remember while I say that, in all due respect to the coal industry in this field, I do not believe that we should demand the abolition of the seventy-five cents differential at the present time, because we have granted that in order to bring the industry back on its feet, and we are doing our part to bring it back on its feet, and I do not think that that hearty relation should be disturbed.

Examiner Newcomb: We will adjourn until ten o'clock tomorrow morning.

(Whereupon, at 6:00 o'clock p. m., October 4, 1937, an adjournment was taken until 10:00 o'clock a. m., October 5, 1937.)

[fol. 232] BEFORE THE NATIONAL BITUMINOUS COAL COM-
MISSION

[Title omitted]

Goldman Hotel, Fort Smith, Arkansas.

October 5, 1937.

Met pursuant to adjournment at 10 o'clock a. m.

Before Carman A. Newcomb, Examiner

APPEARANCES:

John A. Riddle and Robert F. Waldron, Attorneys for
National Bituminous Coal Commission.

Max Milligan, Attorney for Marketing Division.

Joseph V. Machugh, Attorney, Office of Consumers' Coun-
sel.

J. G. Puterbaugh, H. Denman, and S. A. Bramlette, Mem-
bers, District Board No. 44.

Hubert E. Howard and G. O. Patterson, Jr., Attorneys for
Petitioner, Sunshine Anthracite Coal Company.

[fol. 233]

PROCEEDINGS

Examiner Newcomb: The hearing is in session, gentlemen.

Mr. Patterson: Mr. Examiner, at this time I would like
to ask leave to permit the case be reopened to call one wit-
ness on behalf of the Sunshine Coal Company. This testi-
mony, I am sure, will be short.

Examiner Newcomb: Do I hear any objections? Call your
witness, Mr. Patterson.

Mr. Patterson: Come around, Mr. Schull, please, sir.

F. M. SCHULL, Vice-President, Sunshine Mine, Clarksville,
Arkansas, being duly sworn testified as follows:

Direct examination.

By Mr. Patterson:

Q. You are F. M. Schull?

A. Yes, sir.

Q. You live at Clarksville, Arkansas, and are general
superintendent of the Sunshine Mine?

A. Vice-president of it.

Q. Vice-president of the company?

A. Yes, sir.

Q. Mr. Schull, have you recently had occasion to take from the mine samples of coal?

A. This morning.

[fol. 234] Q. State in your own words where you got the coal.

A. I picked three different samples off of part loads under the tipple this morning.

Q. Talk louder, please. We cannot hear you.

A. I picked three different samples, three different sizes of the coal, from part loads that were standing under the tipple. The coal was run over the tipple on the 29th day of this month.

By Examiner Newcomb:

Q. You mean last month, don't you?

A. The 29th day of last month. I am in a new month now. The coal was mined from the 19th of August on up to that time and piled on the ground. We were not in a position to run the tipple or any of the machinery until the 29th of September.

By Mr. Patterson:

Q. Now, Mr. Schull, will you abstract from that sack there the sample of grate coal, if you have such a sample.

A. This is a piece of grate coal taken from N. Y. C. car 436516, and it is a sample of grate size.

Q. Grate size?

A. Grate size. It came out of the Sunshine property. Then I have another sample taken from P. McKy car, we call them, P. McKy car No. 90044, No. 4 nut. I have a sample of the No. 1 nut taken from Pennsylvania car [fol. 235] 355583.

Mr. Patterson: At this time, Mr. Examiner, we desire to offer these three exhibits, Exhibits A, B, and C, to the testimony of this witness.

Examiner Newcomb: Mr. Patterson, you have Exhibits up to the letter N. Please mark them Exhibit "O", "P", and "Q".

Mr. Patterson: We can offer them as exhibits to the petition. Exhibits "O", "P", and "Q" to the petitioner's petition. That will be agreeable.

Examiner Newcomb: So admitted.

(The three samples of coal identified by the witness Schull were marked for identification as Exhibit "O", Exhibit "P", and Exhibit "Q", and were received in evidence.)

Mr. Patterson: That is all, Mr. Schull.

Cross-examination.

By Mr. Puterbaugh:

Q. Mr. Schull, did you select those samples yourself from the cars?

A. Personally, this morning.

Q. This morning?

A. Yes, sir.

Q. You just picked one of these from each car or one or two pieces?

A. I picked out one piece of grate and then several pieces [fol. 236] of nut.

Q. You do not know of your own knowledge whether those are from the upper section or vein or the lower section, do you?

A. Well, you mean between the dirt vein?

Q. Above the two-inch dirt vein, or below the two-inch dirt vein?

A. Oh, no.

Q. You don't know that?

A. No. That is just the way they came over the tippie. That is just the way it came out of the mine.

Examiner Newcomb: Consumers' Counsel, do you have any questions?

By Mr. Machugh:

Q. Mr. Schull, I believe you said you are the vice-president of the Sunshine Coal Company?

A. Yes, sir.

Q. How long have you occupied that position?

A. Since we started sinking, in June 1928, we broke ground there.

Q. Of what year?

A. Of this year.

Q. June 28th, 1937?

A. Yes, sir.

Q. How long have you been in the coal business?

[fol. 237] A. About thirty-eight years.

Q. In what capacity?

A. Every one that exists.

Q. What are they, please?

A. I started loading coal with my old father when I was twelve years old. I became a mule driver at thirteen. I laid track timber, run the motor, acted as electrician helper, and I have done everything, run the cutting machine, dug coal on the slope for years before we knew what machines were. What little education I got I got through the school of hard knocks and not much theory.

Mr. Riddle: This is not cross-examination of the witness. He only testified that he selected the samples and brought them here. That is the only thing he testified to, Mr. Examiner.

Examiner Newcomb: Are you objecting to the examination by Consumers' Counsel of the witness?

Mr. Riddle: To save time.

Examiner Newcomb: I will overrule the objection.

By Mr. Machugh:

Q. Mr. Schull, I believe you say you have one piece of grate and several pieces of nut?

A. Several pieces of No. 4 nut and several pieces of No. 1 nut.

Q. Will you identify for the record which is which?

[fol. 238] A. The large piece—

Q. Will you indicate by the exhibit number as marked on the exhibit?

A. Exhibit "Q" is the grate size; Exhibit "P" is the No. 4 nut; Exhibit "Q", is No. 1 nut. Do you want the sizes it is prepared in?

Q. If you feel it is necessary.

A. Inch and a half to seven-eighths. This runs from inch and a half to two and a half. This runs five by seven.

Q. What kind of coal is that, Mr. Schull, in your opinion?

A. Well, I am not as good a judge of coal—I thought my judgment was as good as anyone else's until I heard a witness testify yesterday and I decided that I was not. I do not think any human—I think it would be an insult to the intelligence of mining men, practical mining men for me or any other human to sit on this witness stand and tell you that I can tell you what kind of coal that is or what the analysis is.

Q. You do not want to say whether or not that is bituminous, semibituminous, anthracite or semi-anthracite coal?

A. No. I am not going to say either. I am not a geologist.

Q. You feel that the petition of the Sunshine Coal Company [fol. 239] for exemption in this proceeding should be granted?

A. I do.

Q. What effect do you believe the granting of that exemption would have upon the consumers of coal of the Sunshine Coal Company?

A. Well, I do not know whether I could give you anything definite on that or not, but I have worked in bituminous mines throughout the United States, most every place, different mines, including the British mines.

Q. Do you think it would be beneficial?

A. I beg your pardon?

Q. Excuse me.

A. And if I have been working bituminous all the time, which I have been led to believe I have, there is a vast difference between the bituminous coal I worked and the coal I am starting to work in the Sunshine mine.

Q. Do you believe the effect upon the consumers will be beneficial or harmful, or are you able to answer that question?

A. No. I am not because I am not in the sales end. I am in the producing end. I have been a producer all the time and paid little or no attention to the sales end. In fact, I do not even know what we get for the coal when we produce it. That is not my job.

Q. Are you able to name two or three typical consumers [fol. 240] of the anthracite coal?

A. I am not.

Mr. Machugh: Those are all the question- I have at the present, Mr. Examiner. Thank you Mr. Schull.

Examiner Newcomb: Has the Marketing Division any questions? Thank you, Mr. Schull.

Mr. Waldron: Mr. Examiner, I have just one or two questions.

Examiner Newcomb: You may proceed, Mr. Waldron.

By Mr. Waldron:

Q. Where has your experience been for the most part during the time that you have been engaged in mining, in what fields?

A. The larger part of it was in Indiana and Illinois. I was born and raised in Danville, Illinois. In the Danville district, in other words.

Q. How long has your experience been in the coal fields of Arkansas?

A. I was at Clarksville or Spadra, they call it, about thirty or thirty-one years ago.

Q. For how long?

A. Oh, just through one run of several months. I would not put that on the record exact, but it was just—I heard of the Spadra field like all mule drivers hear of another coal field, and pastures are always greener for us so I came [fol. 241] to Spadra.

Q. Did you leave the Spadra field then after seven months employment there?

A. Yes, sir.

Q. And when did you next return to the Arkansas field?

A. About a year and a half ago, I believe. I was sent down there to make an inspection of this property. They were then working the old mine that was there; now it was a mine instead of a slope.

Q. Have you spent a year and a half continuously in that field?

A. No, back and forth. I did not come there to stay until we started sinking the new mine.

Q. Approximately how many weeks or months would you say you have spent in that field?

A. Oh, I would not put my record on anything authentic on that. Very little data I keep on anything like that.

Q. Just approximately.

A. We have mines scattered all over and I have been making them all. West Virginia, Kentucky, and I have been down in Alabama and Pennsylvania.

Q. No, I mean the question I would like to have you answer is, approximately how long have you been employed in the Spadra field?

[fol. 242] A. Well, I guess I was there maybe six or seven months at one stretch, and I don't know, I was there long enough to get pretty well acquainted. I have some men working for me at the new place that worked for me at the old mines and I would not have known them from anybody but they knew me.

Mr. Waldron: That is all.

Mr. Riddle: Mr. Examiner, I would like for the examination today to be confined to the counsel. I do not care who asks the questions personally or how many, but if we are all going to ask questions we will be here all day today on four or five witnesses.

Examiner Newcomb: Judge Riddle, that is one of the most favorable statements I have heard during our hearing. If everyone will confine their examination to be conducted by an attorney, we can make better progress and the Examiner will be grateful to everyone of you. If you wish, I will gladly take a five-minute recess and have all interested parties to confer with the attorney and have one as a spokesman, and if possible, have your examination continuous, and when that is finished, that is the end of examination of that particular witness by one side.

Mr. Patterson: In that connection, Mr. Examiner, I think that would expedite the hearing unquestionably, but with reference to the petitioners this situation exists. I would [fol. 243] like to ask special leave for Mr. Gregory at times to ask special questions for the reason that the petition filed by the petitioner here was not prepared by myself or by my firm but was prepared in the Chicago offices of this petitioner. Mr. Gregory is more familiar with it in some particulars than I am, and I really believe that for the purpose of expediting the hearing that at some stages questions by Mr. Gregory on behalf of the petitioner will really expedite it. I assure you that I will hold him down on questions that are inadmissible.

Examiner Newcomb: I believe that fellow counsel and fellow attorneys will recognize that you have just been called into this hearing, that you have not prepared the petition, and we can make some little exceptions, but let's apply a general rule to be somewhat consistent. Have you any objections, Consumers' Counsel?

Mr. Machugh: None whatever.

Examiner Newcomb: Judge Riddle and Mr. Waldron, have you any objections to extending that courtesy to a fellow attorney?

Mr. Riddle: No, sir, none whatever.

Examiner Newcomb: We will take a five-minute recess to confer.

(Thereupon, a brief recess was taken.)

[fol. 244] Examiner Newcomb: You may proceed.

Mr. Patterson: At this time, Mr. Examiner, petitioner rests except for rebuttal and except for the right to furnish the information named yesterday, and with the further right to furnish the Commission with a last minute analysis of the coal from this mine, properly identified as to the place in the mine and the vein from which it was taken.

Examiner Newcomb: Are there present any producers of coal that desire at this time to make application for exemption? If so, will they make themselves known now?

I will advise you that Order 28 of the Commission provides that each such application shall be filed with the Commission in triplicate, shall be duly verified by affidavit and shall include the following: (a) The name and post office address of the applicant and, if said applicant is not the owner of the mining operations or the coal lands involved, the name and post office address of such owner or owners. (b) The designation and exact location of the mine or mines where the coal is produced, including the state, county, and township and producing field or fields. (c) A statement showing the tonnage produced in each of the calendar years of 1934, 1935, and 1936 and the tonnage by months for the first six months of 1937. (d) A statement showing the localities in which such coal is being marketed, together with the names and post office addresses of not less than three persons or firms who are substantial consumers of such coal and are familiar with its qualities and characteristics. (e) A full description of the seam or seams of coal in which mining operations are being conducted and for which exemption is claimed, including analyses of such coal, where available, made by competent persons or authorities satisfactory to the Commission and such other information as will tend to show the character of the coal as to whether or not it is bituminous, semibituminous or subbituminous. (f) A reference to publications and reports of agencies of the United States or state governments, describing the characteristics and classification of the coal in question.

I might further add, in the case of any such applications, the Commission may in its discretion require the submission of further data and may also conduct a hearing upon reasonable notice, at which the petitioner may be required to submit additional evidence in support of the claim for exemption.

Mr. Patterson: At this time, if the Examiner please, I would like to ask leave to file petitions for exemption on behalf of the D. A. McKinney Coal Company, Clarksville, Arkansas, and on behalf of the Diamond Anthracite Coal Company, a partnership, Clarksville, Arkansas. And I [fol. 246] would like to ask if there are any objections to it, if there is no objection that the evidence taken on the question now before us concerning the Sunshine Anthracite Coal Company be adopted as the evidence on these other two applications.

Mr. Riddle: Yes, we will agree to that.

Examiner Newcomb: Mr. Patterson, have formal applications been filed with the Commission?

Mr. Patterson: They have not, for this reason. These parties came in here yesterday morning in the midst of this hearing and stated at the time that they had decided to do that, to take that course, and we have had no time to prepare formal petitions.

Examiner Newcomb: It will be so noted on the record. And may I further suggest, Mr. Patterson, that upon the submission of the application for exemption by your clients that you repeat again that the testimony taken in this Sunshine Anthracite Coal matter should be considered as testimony for the other two producers seeking the exemption. It may be wise that such statement be in affidavit form from the two producers, that they wish their testimony or the Sunshine Anthracite testimony to be the testimony for their case. Are there any objections?

You said there was no objection, Judge Riddle?

Mr. Riddle: No. I reserve the right to object to a new analysis, an analysis other than that filed with the petition. [fol. 247] Examiner Newcomb: The record will show your objection.

Mr. Riddle: It has not been offered yet.

Examiner Newcomb: The record will show the reservation of that right to object to the submission of analyses.

Mr. Patterson: At this time, we are willing to agree that the analyses furnished as evidence in the Sunshine case will be the only analyses furnished on the other two petitions.

Mr. Riddle: That takes out the objection.

Examiner Newcomb: All right, then, remove the objection.

Mr. Machugh: Mr. Examiner, I do not want to enter a formal objection at this time on behalf of Consumers' Coun-

sel, but I should like to have the record show that if these other applications are filed, that even though the testimony in this hearing may be incorporated in that, it will not constitute the complete hearing upon that should the Commission set a hearing for additional testimony, additional testimony may be taken. I would like for the record to show that.

Mr. Patterson: We are very agreeable that the case be opened on order of the Commission for additional testimony.

Examiner Newcomb: That is the authority vested in the Commission, that they may reopen and request additional [fol. 248] evidence and data and exhibits. Do you wish to reserve the right on behalf of Consumers' Counsel to participate in said hearings?

Mr. MacHugh: And to object. At this time I will not enter an objection but will reserve the right to object at that time.

Examiner Newcomb: Have the record note the statement and the reservation granted Consumers' Counsel.

Mr. Patterson: I might state that the petitions will be filed. It may be a day or two, but they will contain, as near as possible, the allegations necessary to meet the requirements of Order 28 just read by the Examiner.

(A discussion was had off the record.)

Examiner Newcomb: The record will show that since he has made that statement to you, that it removes Judge Riddle's objections to that statement. Since the Sunshine Anthracite Coal Company has concluded their testimony and the other producers have expressed their intention of filing an application for exemption with the Commission and that the testimony in the Sunshine Anthracite case shall be considered the testimony of the two named producers seeking the application for exemption or seeking exemption, we will now proceed to the next order of business.

Do you care to make an opening statement at this time, Judge Riddle?

[fol. 249] Mr. Riddle: No, Mr. Examiner. We have no statement to make.

Examiner Newcomb: This is the portion of Order No. 53 applying to such coals as are produced in the State of Arkansas? Is that correct?

Mr. Riddle: We now offer additional evidence from that introduced yesterday on behalf of the Commission to cover the entire Order, including the trial of the petitioner, the Sunshine Anthracite Coal Company, and ask that the same evidence be considered in full compliance with the order or all the evidence that will be introduced under the order from the District Board or the Counsel for the Commission.

Mr. Machugh: Will you designate the number of the order, if you please, for the record?

Examiner Newcomb: Order No. 53, Mr. Maelugh, and it is predicated upon Order No. 28 of the Commission, if that is not on the record.

Mr. Patterson: I would like for the purpose of the record, for the record to show that this is testimony that we are now about to take, that it is in answer and rebuttal to that taken by the petitioner?

Mr. Riddle: Yes, and also to comply with the other parts of the order.

(A discussion was had off the record.)

[fol. 250] Mr. Riddle: We will call Mr. Collier.

Examiner Newcomb: Will you be sworn, Mr. Collier?

H. W. COLLIER, President of the Collier-Dunlap Coal Company, Clarksville, Arkansas, was duly sworn and testified as follows:

Direct examination.

By Mr. Riddle:

Q. State your name.

A. H. W. Collier.

Q. Where do you reside, Mr. Collier?

A. Clarksville, Arkansas.

Q. What is your business?

A. Coal mining business.

Q. How long have you been engaged in the coal mining business?

A. I started in the coal mining business in 1901. I was out for a few years and was back and have been in active management since 1916.

Q. Are you now a producer of coal?

A. A producer.

Q. Where is your mine located?

A. It is in the Spadra field.

Q. How close to the mine of the Sunshine Anthracite Coal Company?

A. I would judge about three or possibly four miles.

[fol. 251] Q. Are you mining the same coal, the same seam of coal that that company is mining?

A. Yes, sir.

Q. And have you been so mining it ever since you began operations there?

A. Yes, sir.

Q. Mr. Collier, did you take some specimens of coal and bring them here to this hearing?

A. Yes, sir.

Q. I hand you Exhibit 2 and ask you where you got that coal?

A. I got that at the Sunshine mine.

Q. That is the petitioner's mine?

A. Yes, sir.

Q. That is the same piece of coal that was tendered to Mr. Gregory yesterday and he did not know his own baby?

A. That is the one.

Q. That is one. Now, I hand you Exhibit No. 2, a specimen of coal, and ask you where that came from?

A. It came from D. A. McKinney's mine.

By Mr. Patterson:

Q. What was that answer, Mr. Collier?

A. It came from D. A. McKinney's mine.

Q. The first one was from the Sunshine?

[fol. 252] A. Yes, sir, the Sunshine.

Examiner Newcomb: Talk a little louder, please, Mr. Collier.

A. Yes, sir, I will try to.

By Mr. Riddle:

Q. I hand you now Exhibit 3; did you select that specimen?

A. That specimen was shipped in here by Guy Johnson from Paris, from the Grand No. 3 mine. That is not a Spadra sample.

Q. That is not a Spadra sample, but I will ask you if it is not mined from the same seam of coal that the Spadra coal is mined from?

A. Yes. We consider it the same seam. It is in the same district and so similar I cannot tell them apart. The structure and everything is so similar that I cannot designate them except I know those two pieces over there, from the size and shape of the piece, because I handle them.

Q. No. 5 piece of coal.

A. That came from Paris.

Q. That is the second piece from Paris?

A. Yes, sir.

Q. And No. 6.

A. That is also from Paris.

[fol. 253] Q. From your knowledge and experience in the coal fields, I will ask you if all of those specimens of coal, marked Exhibits 2 to 6, inclusive, are from the Arkansas vein of coal, either the Spadra field or others?

A. They are.

Q. I hand you Exhibit 1. To your knowledge of coals, what kind of coal would you say that is?

A. Pennsylvania anthracite.

Q. There is nothing like that in the State of Arkansas, is there?

A. I have never seen anything like it.

Q. Have you been in that business in the state for thirty years?

A. About thirty-six years.

Q. What classes are all these coals except Exhibit 1, which I showed you and you identified as Pennsylvania anthracite, what classes do those other coals belong in?

A. I am not a geologist, but my idea is that they belong in the semibituminous class.

Q. And you have always so considered it, have you, with all of your experience?

A. Well, I have not studied geology but I have heard it called Arkansas anthracite, but when I began to study I decided it was semibituminous.

Q. You have no other opinion at this time?

[fol. 254] A. No, sir.

Q. Now, what are some of the characteristics of semibituminous or super-bituminous coals?

A. It is bituminous, smokeless, and cokes very little. Spadra coal, the bottom seam does not coke any; the top seam will swell but does not run together.

Q. Has it got any other distinction now, between anthracite coal or bituminous coal?

A. Well, anthracite coal burns with a blue flame; all these other coals burn with a more or less yellow flame. All Arkansas coals have a more or less yellow flame. It has a short flame, but it is more or less yellow.

Q. What about the structure throughout the coal seam in which you are mining; what does it have underneath the coal?

A. It has a very hard shale. Some places it seems like it is harder than shale could be. A very hard rock just under the coal.

Q. Is that what they call "Longhorn sandstone"?

A. Hartshorne.

Q. Hartshorne?

A. Yes, sir.

Q. I will ask you if you know whether or not the Hartshorne sandstone underlies all the coals throughout the state [fol. 255] of Arkansas; that is, the vein which you are mining and the vein which this petitioner mines?

A. I don't know very much about that stone except what is shown in the geological survey. It is a very hard stone under all the mines everywhere. I have not seen any mine that had a soft rock under it.

Q. You designate it then as what is commonly known as the Hartshorne sandstone?

A. Well, it is similar and I think that is it. That is what the geologists call it, the Hartshorne sandstone.

Q. You have seen no geologist's report that held any other way?

A. No, sir.

Q. Now, do you know anything about the history or the manner in which it was ever claimed that there was any anthracite coal in this state?

A. Well, I do not know that I do. When I went to Spadra first in 1901 we simply sold it as Spadra coal. And after a few years that field was sold to some people at Scranton, Pennsylvania, or from Scranton, Pennsylvania, and they called it Arkansas anthracite. I think the main thing was it was crushed and prepared in the same sizes as Pennsylvania anthracite. At that time other coals in this district were sold mostly to the railroads and they were classified purely as "lump" and "mine run." I think those are the only two classifications they had at that time.

Q. When you began here the anthracite coal was not to be had in this state, so far as you know?

A. No. I did not think anything about anthracite coal at that time.

Q. And that has been since developed, has it not, from the sales standpoint?

A. I think so, yes, sir.

Q. Now, what resemblance, if any, is there between Pennsylvania anthracite and these coals that I have exhibited to you from Spadra?

A. So far as the looks go, you mean?

Q. Yes.

A. Well, there is not very much resemblance in looks.

Q. Is there any as compared?

A. Well, there is some. It is black and then there are some shiny faces on the Spadra coal, some small shiny faces, but it is very dissimilar to my way of thinking.

Q. How about the hardness and friability?

A. There is no comparison so far as hardness and friability goes. Pennsylvania is very much harder and less friable than Spadra or the coals anywhere in this section.

[fol. 257] Q. What is the appearance of these coals that I have tendered here compared with Pocahontas?

A. They are very similar in appearance to Pocahontas.

Q. How about the comparison of the Spadra and Paris?

A. Spadra and Paris are very similar. I cannot tell one from the other by just looking at them.

Q. With what coals, as an operator with Spadra coals, do you think, as a high, super-bituminous, compete?

A. With what coals does it compete?

Q. Yes, in price and markets and so forth?

A. Well, in the southern territory, I will say south of Omaha, the competition is mainly with the smokeless district itself. That is from, I would say, from Poteau and Bernice, a section across the country from Poteau to Bernice.

Q. Poteau is in what state?

A. Poteau, Oklahoma, to Bernice, Arkansas. They are similar coals and are the strongest competitors with each other. When you pass Omaha going north we compete with Pocahontas almost entirely.

Q. You know that Pocahontas is a semi or super-bituminous coal, do you not?

A. Well, it is smokeless. That is, it is about as smokeless as our coal is and it has about the same structure. It [fol. 258] looks like it.

Q. What about the prices in the Twin Cities, if you know about that, the retail prices?

A. The retail prices in the Twin Cities are usually about the same. That varies sometimes. Now, last year we were, I believe, fifty cents below Pocahontas. This year they are somewhat below us.

Q. So, the coals that are mined here, the Spadra and around the fields where the applicant's mine is located, come in competition in the market solely with the Pocahontas coals?

A. Well, not solely. There are some other coals up there. For instance, there are Briquets, and in the Twin Cities there is some Pennsylvania anthracite. However, we never hear of Pennsylvania anthracite and we do not base our prices on the prices of Pennsylvania anthracite. We never take that into account at all in fixing our prices. We fix our prices based on the coals in this immediate vicinity and on Pocahontas coal.

Q. You compete with all coal in District 14, do you not?

A. Yes, sir.

Q. I will ask you if you have not been recently in Washington in an attempt to coordinate prices with the Pocahontas people of West Virginia?

[fol. 259] A. I have.

Q. And what was done at that meeting?

A. Well, there were a number of conferences. There was nothing reached. The matter is still left open. There is no place where we coordinated on District 14 except with the Pocahontas. We accepted every other district that joins us. There was no question at all by us as to their coal prices and there was no question about them as to our prices. They don't pay much attention, these other districts near us don't pay much attention to our coal and we don't pay much attention to their coal, but the Pocahontas is where we have our coordination problem.

Q. Your principal competition?

A. And our competition principally, yes, sir.

Q. And what is the production in the Spadra field, and the names of the operators, if you can give them?

A. Do you want the names of the operators?

Q. Yes.

A. D. A. McKinney Coal Company, Diamond Anthracite Coal Company, Rajada Anthracite Coal Company, Jamestown Mining Company, Smokeless Coal Company No. 2.

Harding Coal Company, Smokeless Coal Company No. 1, Sunshine Anthracite Coal Company, McAlester Fuel Company, The Blue Blaze Coal Company, and Collier-Dunlap Coal Company.

Q. Approximately what was the production last year?

[fol. 260] A. Approximately 210,000 tons.

Q. The year before?

A. About 160,000 tons, I think.

Q. What was it the year before that?

A. The year before that, about 97,000 tons, is my best opinion.

Q. 160,000 tons?

A. 160,000 tons in 1935 and (about 97,000 tons in 1934.

Q. How much in 1936?

A. In 1936 about 210,000 tons. That is not for the calendar year. That is the season; that ran through the winter.

Q. So the production has been gradually increasing the last three years?

A. Yes, sir.

Mr. Riddle: You may ask him.

Mr. Machugh: Mr. Examiner, may I make an inquiry?

Examiner Newcomb: Certainly.

Mr. Machugh: Am I correct in my understanding that the coal about which Judge Riddle has been questioning Mr. Collier has not been offered in evidence; it was merely marked for identification?

Examiner Newcomb: That is correct.

Mr. Riddle: Yes. I am now offering the various specimens, and I will have to get a piece of paper to put the letters and figures on the exhibits. I am now offering these several specimens that have been identified in evidence, if the Examiner please.

Examiner Newcomb: So admitted.

(The specimens of coal referred to were marked for identification as "Commission's Exhibits 1, 2, 3, 4, 5, and 6," and were received in evidence.)

Examiner Newcomb: Any further questions of this witness?

Mr. Patterson: Yes, if the Examiner please.

Cross-examination.

By Mr. Patterson:

Q. Mr. Collier, you are a member of the District 14 Board under the Guffey Act?

A. I am.

Q. How long have you been operating the mine at Spadra?

A. I started first in 1901 and I was not in active management but I was an owner during all the time. I began as active manager of the mine in 1916 and have been continuously since that time.

Q. You were asked, Mr. Collier, how you classified the coal. You have classified it, I believe, in your answers as semibituminous. I will ask you to tell how you classified [fol. 262] that, what method of classification?

A. The only thing that I have at all is just my interpretation of those reports of the Geological Survey and the reports from the University of Arkansas.

Q. I will ask you if you do not classify that according to its physical appearance, in your answer now, according to its physical appearance and largely on reputation? You stated it was anthracite because some Pennsylvania people came down here and started to call it that. Isn't that the way you classify it?

A. No. It is owing to how you want to classify it. If you want to classify it as to its geological value, you would have to classify according to its physical qualities.

Q. Do you know whether or not the United States Government Bureau of Mines has established a yardstick for the purpose of classifying coal according to rank, as to whether it is anthracite, semi-anthracite, bituminous or subbituminous?

A. I saw a bulletin with those ranks mentioned.

Q. And I will ask you if that information circular No. 6933, which was introduced as an exhibit to the petitioner's petition here yesterday—I do not think that is the one you saw—but that method, if they have established a yardstick, so far as you know that is correct, so far as the geological [fol. 263] make-up of the coal is concerned?

A. I could not testify about geology. I do not know.

Q. Yes. Now, Mr. Collier, have you ever sold any of your coal from your mines as bituminous coal?

A. We sell our coal as Pilot coal.

Q. As what?

A. Pilot coal.

Q. Have you ever, from your recollection, in your advertising ever advertised the coal as being bituminous?

A. No, we have not done that.

Q. Have you ever advertised it as having been a grade of anthracite coal?

A. We have had some advertising of it as "Pilot Arkansas anthracite."

Q. You have never, however, furnished the trade with any advertising matter designating that coal as any grade of bituminous coal, have you?

A. No. I have not heard of any coal being advertised like that. They all have something different. They don't advertise bituminous. That is, anything that I have seen has not advertised as bituminous.

Q. You say the Paris coal has the same appearance as the Spadra coal, and as far as you know it is the same. I will ask you if they have not got a differential in freight [fol. 264] rates between Clarksville and Paris?

A. They have.

Q. Do you know why that is?

A. I know a part of the reason but I do not know all of it. A part of the reason, what the railroads say is that the haul is longer.

Q. You do not know whether or not it is based on the—because of the character of the coal, with reference to being semi-anthracite or bituminous?

A. I do not think that has a thing in the world to do with it. That rate was established—that differential was there when I started in business in 1901 and that was fixed, to the best of my knowledge—the Western Coal & Mining Company had a mine at Denning and they had one at Jenny Lind and there was no way of establishing freight rates at all. There was no Interstate Commerce Commission or anything else. They could make any rates they wanted. Some Jews went to Spadra and started mining and they just made them pay twenty-five cents more than they were paying. There was no other reason, so far as I know, why it would have paid a higher freight rate. That custom got established and the people that went into the mining business down there were never able to fight the thing through the courts and the Interstate Commerce Commission, and that differential [fol. 265] has stood all during the years.

Q. You do not know of your own knowledge of any operator—I believe you answered the question—in the Spadra field ever having tried to impress on the trade anywhere in the trade territory that they were selling bituminous coal out of Spadra?

A. I have never heard of anybody anywhere trying to impress on the trade that they were selling bituminous coal, the lowest class of coal. I have never seen any advertisement carrying the name bituminous, so far as I remember.

Q. Did you make any examination in Washington in an effort to ascertain what the Bureau of Mines had said about Spadra coal, with reference to its geological make-up?

A. I did not.

Q. You were not advised there that Spadra coal was semi-anthracite and not bituminous?

A. I was not.

Q. By any bureau?

A. I was not.

Mr. Patterson: I believe that is all, Mr. Collier.

Mr. Gregory: Mr. Examiner, may I ask Mr. Collier a few questions? I will be as brief as possible.

Examiner Newcomb: Yes, sir.

[fol. 266] By Mr. Gregory:

Q. Mr. Collier, you mentioned awhile ago that all the Arkansas coal burned with a yellow flame. Are you familiar with the Blue Blaze Coal Company?

A. I am.

Q. Is that a large producing company in Spadra?

A. They are.

Q. Is that perhaps the largest producing company in that field?

A. I don't know about that. Some years they are the largest and some years they are not.

Q. Does their coal burn with a yellow flame?

A. It burns just like ours does. It adjoins our property and it burns just like ours.

Q. That is what I am trying to find out.

A. The coal starts, when it first begins to burn it will have a yellow flame; after it burns until it gets entirely red all the way through, this yellow part of the flame rather gets out of it and burns more or less to a blue, but in all that coal I have ever seen burn the first flame is a yellow flame.

Q. Then all Spadra coal does burn with a blue flame?

A. I don't know about that. I think that finally, before it is finished, that most of it finally burns with some blue [fol. 267] flame. However, I think there is always a yellow tinge to that flame. I don't think it ever gets down to be a purely blue flame.

Q. You have been selling coal here for thirty-six years; you have been selling this coal as semi-anthracite or smokeless Arkansas anthracite. What classification have you been selling it?

A. We have been selling it as "Pilot Arkansas anthracite." For a number of years Mr. Puterbaugh sold it as purely "Fernwood," no other name to it. That was for about twelve years.

Q. But such classification or any classification applied to our coal was Arkansas anthracite coal, is that right?

A. If there was ever a classification that was probably it. I don't know whether there has been distinctions or not.

Q. Do you sell any lump coal?

A. I don't think we have sold a car of lump coal in ten years.

Q. Does the Paris field and all the other Arkansas producing semibituminous fields sell lump coal?

A. They, a few years ago, sold nearly all their product in lump. Now, they are breaking it down just like we are and the majority of their product, the way I understand, [fol. 268] is sold in the smaller sizes. I have sold Spadra coal in lump. The first few years we were in the field we sold it all as lump.

Q. But your testimony is that the majority of the coal now produced in the Spadra field is now broken down?

A. That is my belief, that the majority of the coal produced in the Arkansas or smokeless seams, it is sold broken down. If it is a lump, it is not a big lump. The trade doesn't want that coal in any big lumps any more.

Q. That is true of all coals all over?

A. So far as I know.

Q. You mentioned about this competition matter. Are you in competition with Paris coal and other Arkansas coals?

A. Yes, sir.

Q. Are you in competition with natural gas and oil and Pocahontas coal?

A. Yes, sir.

Q. In competition with all of them?

A. Yes, sir.

Q. Then you are in competition with every kind of fuel except Pennsylvania anthracite, is that right?

A. We are in competition with every grade of fuel and also with Pennsylvania anthracite to a certain degree, but then those degrees vary. They start in as a hard competitor [fol. 269] and they just go down and down the scale until they almost disappear.

Mr. Gregory: That is all.

Mr. Patterson: One more question, if the Examiner please.

By Mr. Patterson:

Q. Mr. Collier, you have identified here a chunk of coal which you state came from the Sunshine mine. Did you personally get it?

A. Yes, sir.

Q. Will you tell us just where you got it?

A. Off of a car. I don't know anything about the car number.

Q. From a car situated at the mines?

A. Yes, sir.

Q. And when did you get it?

A. Sunday night.

Q. Sunday night. That was what time?

A. About six o'clock. I came in from Washington Sunday afternoon about four-thirty and after about an hour I went and got this sample.

Q. That was in their yards at the tipples?

A. Yes, sir.

Mr. Patterson: That is all.

Mr. Gregory: Mr. Examiner, I have one more question [fol. 270] that I would like to ask, if I may.

By Mr. Gregory:

Q. Mr. Collier, you bid a price of \$3.47 on the Fort Snelling business, on your egg coal, this past season from the Collier Dunlap mine?

A. In 1936, we did.

Q. I have here a document signed by Mr. Bramlette enclosing a list of prices, suggesting the price of \$5.50. It

says, "This proposed price list has not been approved by the Commission, but is for your confidential information. The information contained therein is not to be divulged or given out to anyone by code members." I just wanted to ask you one question. This price list shows the price of \$5.50. Is it your purpose to set up an advance of \$2.03 a ton on this coal under the Guffey Bill?

A. Let me see the letter. That is September 30, 1937?

Q. Yes, sir.

A. This coal for the Government was bought in 1936.

Q. Is this the price that is proposed?

A. That is 1937 also.

Q. Has your costs advanced two dollars per ton since the Guffey Bill was passed?

A. Our cost has advanced considerable. I would say anyway twenty to twenty-five percent.

[fol. 271] Mr. Gregory: That is all.

Redirect examination.

By Mr. Riddle:

Q. Now, these coals especially in Arkansas and eastern Oklahoma are all advertised as anthracite coals, and semi-anthracite, aren't they, by the sellers?

A. Well, semi-anthracite mostly.

Q. Semi-anthracite; in both states? Is that not correct?

A. Yes, sir, in both states.

Q. Did you ever know of any geologist that has ever found by any analyses that there was any coal in Oklahoma that was any way approaching the anthracite price?

A. I don't know. In regard to this advertisement, I might say also that there has been quite a lot of coal from these other fields shipped as Arkansas anthracite. You can find that all over the territory. I have found coal that dealers had in their yards, they said that they had Arkansas anthracite and I asked them where they bought it and they would tell me some man they bought it from and I would find that he was not from Spadra at all, that he would be from Paris or even from Oklahoma. A man was selling it out of his yard as Arkansas anthracite and the shipper was in Oklahoma.

[fol. 272] Q. Are you a member of the code, Mr. Collier?

A. Yes, sir.

Q. Do you have a contract with the United Mine Workers?

A. Yes, sir, we do.

Q. Have you ever had a contract with the anthracite and paid the anthracite wages for getting coal?

A. We have not.

Q. Has there ever been an anthracite contract signed in this state?

A. Not to my knowledge.

Q. Not while you have been in business?

A. No, sir.

Q. You always sign a bituminous coal contract and have ever since you have been in the business, is that correct?

A. Yes, sir, since 1902. I think 1902 is when we started here, when the miners came into Arkansas.

Mr. Riddle: I think that is all.

By Mr. Machugh:

Q. Mr. Collier, I believe you testified that you are a coal producer in the Spadra field?

A. Yes, sir.

Q. How many mines do you operate?

A. One.

[fol. 273] Q. And that is located in Clarksville?

A. It is about eight miles out of Clarksville.

Q. What is the name of the company?

A. Collier-Dunlap Coal Company.

Q. What is it?

A. Collier-Dunlap Coal Company.

Q. And what is your position in that company?

A. President.

Q. How long have you been president of that company?

A. Since about 1932, I believe.

Q. Was the company in existence prior to that date?

A. It started in 1916. My father was president up until the time he died, and he died in 1933. I think I was president about a year before he died.

Q. Did you occupy some position before you became president?

A. I was secretary and treasurer, beginning in 1916, up until the time I became president.

Q. Have you stated your annual tonnage for that company? If it is in the record, I won't ask you again.

A. I have not stated it. That has varied with the market. We have run or we have produced all the way from about nine thousand to about forty-seven thousand tons.

Q. During what period of time, for what years?

[fol. 274] A. Well, starting in 1916. There have been good and bad years just scattered along through. I could not tell in any year just what it would be offhand.

Q. What was your production for 1936?

A. For 1936 it was a little bit over thirty thousand tons. Thirty thousand three hundred and thirty-seven, if I remember correctly.

Q. How many days did your mine operate during 1936, approximately?

A. Somewhere near ninety, but I don't remember; between ninety and one hundred days.

Q. Where is your coal sold, in what territory?

A. We sell some of it in New Orleans, some of it in Galveston, we sell it in Minneapolis and out in South Dakota and all the district between, west of the Mississippi River.

Q. How much of your coal is shipped out of the State of Arkansas?

A. Oh, ninety-nine and one-half per cent, I think. We hardly sell any of it in Arkansas.

Q. To what type of consumers is your coal sold?

A. It ~~is~~ sold—formerly our coal was sold to the rich people, before the gas and oil came in, the people that were able to put in their coal in the spring and buy what they wanted and pay a high price for it and have it properly [fol. 275] prepared. Later, when they went to gas and oil, we have been able to sell to our customers that are able to pay a high price for coal.

Q. That is what is known as the domestic market?

A. Yes, sir.

Q. Do you sell to the industrial market at all?

A. No, sir.

Q. Are you able to give us the names of two or three typical consumers of your coal?

A. I don't think I would because those things—we hardly ever sell a car this side of Kansas City, and I don't have any knowledge of where that goes. I know the dealers but don't know who buys the coal from the dealers.

Q. In the event that the exemption is granted to the Sunshine Company, what effect do you believe that will have upon the consumers of coal from the Spadra field?

A. So far as the consumer is concerned, he will probably just change and use a little less Spadra coal than he has been using. He will get coal and he will probably use some other grade instead of Spadra. I would just like to mention here something that happened to us last year. This is in the Twin Cities. There was coal selling from our field at three dollars per ton, f. o. b. mine. That coal cost the dealer in the Twin Cities \$7.62. I want to change that statement [fol. 276] there. The price in the Twin Cities last year was \$13.30 on one size and \$13.80 on another size. A part of our coal that was sold as low as three dollars—it ranged anywhere from three dollars to four dollars fifty cents; a man just sold it for what he could get—that coal was being retailed to the dealers at from \$13.50 to \$13.80. The same coal that was sold at three dollars went to the consumer at \$13.80. There was a profit in there of \$6.18 to the retail dealer. The consumer does not get any benefit in the world from any reduction in prices. I think what will happen—

Q. Reduction in prices by whom?

A. By the man at the mine, by the men in this district. They fix their prices based on the quality of the coal and they sell at those prices regardless of the prices that come from the mine. What would happen in Spadra, if that is what you want to know, if this thing were granted?

Q. I do want to know it.

A. My idea is that the price of Spadra coal would go down one dollar per ton. There would be no benefit in the world; the consumer would never know that dollar was there; the middle man between here and there would get that profit and the miners here would lose it. We cannot sell coal at that price. We cannot produce it at that price and it will put all the mines out of business that are not [fol. 277] able to stand over, that have not created a surplus enough to carry through for a year or so until this thing is over.

Q. You say the consumers will not be able to have Spadra coal if this exemption is granted in this case and in others?

A. I think that they probably would buy less Spadra. Some of them probably might buy Spadra anyway, but the dealer immediately will quit buying the higher priced Spadra coal. Those that work under the code will not be able to sell to the dealer because they won't buy from the men that have the high prices when there is a dollar difference. They

will buy from the other man. If they don't get the coal they will sell him something else; they will sell him Pocahontas or Briquets or something else.

Q. Will that be beneficial or harmful upon the consumers?

A. I cannot say that. It won't benefit them any. It will give them a coal that they really do not want. Some of them want Spadra coal and they cannot get that.

Q. Have you anything else to say as to any effect it may produce upon the consumers if this exemption be granted?

A. I don't know whether there would be any other effect [fol. 278] on the consumers or not. One thing is they would forget Spadra coal. That would be an effect on Spadra, however. After they have used something else, gone to some other coal, then you cannot bring them back.

Q. Have you anything further to say on that, Mr. Collier?

A. I do not think I have.

Q. Now, Mr. Collier, as to these specimens of coal which you have identified and which have been offered in the record. Did you select those specimens of your own volition?

A. Yes. My idea in selecting those things was to get coal here from two or three different fields, just to show the similarity of structure. I did not have in mind to trip some man up or anything like that. It is purely to show that the structure is the same. The coals are almost identical in every way. The only difference that I can see is in the chemical analyses. So far as the physical qualities are concerned, there is little difference. The only difference you can tell from looking, there is some difference in the hardness. The coals to the east are a little harder than those coals towards the west.

Q. You did not select them at the request of anyone else then?

[fol. 279] A. No.

Q. What did you do with them after you selected them?

A. I brought them right in here.

Q. And turned them over to whom?

A. Turned them over to Mr. Riddle, I believe.

Mr. Machugh: That is all.

Mr. Riddle: I have nothing else in mind. Thank you, Mr. Collier. Those are all my questions.

Examiner Newcomb: Do you have any further questions, gentlemen?

Mr. Riddle: Yes, Mr. Examiner, if you please.

By Mr. Riddle:

Q. The competition between all producers in eastern Oklahoma and western Arkansas, including the Spadra field, is very keen here, is it not?

A. It is. Yes, sir. Our working time is very limited with everybody trying hard to increase that running time and they are doing everything that they reasonably can to increase their running time.

Q. Now, the exemption of any one mine in this state would tear down the entire price structure, would it not?

A. I think so. There is no doubt in my mind about that. If the other Spadra operators would meet the price that would be made by that mine, then the other districts would [fol. 280] all be forced to come down to meet Spadra. You will have the thing just like it has been for years.

Q. Yes, if one, two or three, it would make a practical monopoly of the coal business here, wouldn't it?

A. Yes.

Q. If they were exempted and the rest of you fellows all joined the code and complied with the minimum and maximum prices fixed by the Commission, and there were two or three companies exempted, it would give them a practical monopoly of the coal business in this state?

A. There is only one opportunity that I can think of that would let the mines operate any and that would be for a blizzard or storm to come when they were not able to get coal at all somewhere else. In any ordinary weather, under ordinary conditions, they would get all the business and the other mines would not get any.

Mr. Riddle: That is all.

Mr. Patterson: One more question, if the Examiner please.

By Mr. Patterson:

Q. Have you made any study—I believe you said awhile ago that you had studied the Government analyses to some extent of the Spadra coal?

[fol. 281] A. I looked over those things.

Q. Yes.

A. But the tables were the only things I looked at. The tables of analyses. I did not read the reading matter in those things and I have never made any study along that

line. It was just merely the tables and the figures that they had there.

Q. Would you say that mining methods and methods of marketing or prices obtained would have any weight on the rules for classifying coal according to geological make-up?

A. If you are going to classify according to the Guffey-Vinson Bill, I think that they would.

Q. But as to geological make-up, if the Government has ever done that, would you say that those three items would have anything to do or have any weight?

A. I have not studied the geological survey to know anything about it, but I would just like to call your attention to the Guffey Act, that annex to the Act, schedule of districts, and District 14 is described as follows: "The following counties in Arkansas. All counties in the state." Now, there is very little coal produced in Johnson County outside of what is produced in Spadra. There are small wagon mines, twenty miles out from the railroad, just one or two men working in the mines and they are so small that [fol. 282] I think they never would have been taken into account if it had not been for the Spadra field.

By Mr. Riddle:

Q. Hasn't Congress really classed it as bituminous coal?

A. How is that?

Q. Congress really classified this coal in the enactment of the Act?

A. I think they did. That is my understanding of the Act, that they classified it as bituminous coal and as coming under the Act, whether it was just on the border line of some other coals or coal. There is no doubt in my mind but what they intended to cover this entire seam, and everybody that has any direct competition with each other. We are all on the same seam of coal here and in direct competition with each other. We do not come in competition with any anthracite coal from anywhere to any noticeable degree and there is no other reason for making that except the various hard competition that was going on at that time.

By Mr. Patterson:

Q. Congress did, however, in the Act attempt to define lignite in geological terms, did it not?

A. You can read the Act. You understand that as well [fol. 283] as I do.

Mr. Patterson: That is all.

Mr. Riddle: That is all.

Mr. Gregory: I would like to ask one more question, Mr. Examiner.

By Mr. Gregory:

Q. Mr. Collier, in this list of prices which District 14 submitted to the Commission for approval, you have a price of \$2.25 on your seven-eighths inch slack. The highest price suggested from any other mine in the whole district is \$1.10 a ton, on the same coal. Can you explain that?

Mr. Riddle: I object to that.

A. That price is not our price.

Mr. Riddle: Going into the price end of it here is not, as I understand it, the function of this hearing. Now, the questioner is the marketing agent of this concern. I do not see that that has any bearing on the matter at issue, and I object to it.

Examiner Newcomb: In answer to some of your questions and also in answer to some of the questions by Consumers' Counsel, the witness testified as to price.

Mr. Riddle: I will withdraw the objection.

Examiner Newcomb: There is no objection. Let the [fol. 284] record show that he withdraws his objection.

By Mr. Gregory:

Q. To find out honestly why there is a difference, Mr. Collier, can you tell us why your coal is worth \$2.25 and the next best coal is worth \$1.10, in price?

A. There is some difference in our slack and their slack. Some difference in the uses made of it. The reason they used high priced slack was to be able to get the price on the other grades, grades to the domestic consumer, as low as possible. If we would reduce the price of slack we would naturally have to come up on the prices of the other grades. The people that are using our slack are making big money furnishing war materials and they are amply able to pay the price. The coal that they are getting, slack coal, is being sold to them at less than cost. And there is no reason that I know of why we should charge the domestic consumer an additional high price and reduce the price to a consumer that is fully able to pay it.

Q. Your price to a domestic consumer here is averaging about seventy-five cents a ton higher than any other coal in the field. What I am trying to get at, why don't these people buy this \$1.10 coal, if there is no difference?

A. They do buy some of it. They can use a certain [fol. 285] amount of it.

Q. Not for the same purposes?

A. They buy some coal even at less than \$1.10. They buy some twenty-five cent coal from Paris.

Q. They buy the Paris coal at twenty-five and this at \$2.25?

A. They buy quite a lot of dead coal. They get that around \$1.29, something like that.

Q. What accounts for the difference of one hundred percent in the price of the coal if the coal is all the same?

A. I did not say the coal is all the same. I say there are certain differences. There are no two coals, no two mines, not any two rooms in a mine just exactly the same. There is always more or less variation everywhere.

Q. If they can buy plenty of coal at \$1.10, why don't they buy it instead of paying \$2.25 on a twenty-five cent higher freight rate?

A. In the Spadra, you mean?

Q. In the other Arkansas fields outside of Spadra.

A. Well, why they buy that and why they don't, I could not tell you. You will have to ask them. I do not understand their business.

Mr. Gregory: That is all.

[fol. 286] Mr. Riddle: That is all.

By Examiner Newcomb:

Q. Mr. Collier, you have been in the Arkansas fields since approximately 1901? Is that correct?

A. Yes, sir.

Q. And you stated that back in 1901 they called this coal Spadra coal?

A. Yes, sir.

Q. And that is the same coal that today is called Arkansas anthracite?

A. We operate a mine which is a quarter of a mile from the present Sunshine anthracite, and that is what we sell it for. The Sunshine Anthracite mine was started about

1905 and it was sold as Spadra coal. Possibly 1903 or 1904. I guess 1903 or 1904 that mine was started.

Q. You have had many years of experience in the coal fields in the State of Arkansas. What rank would you place the Spadra in?

A. I could not rank it geologically because I just am not a geologist. I know what it competes with and what it always has competed with, but as far as classifications along that line, I am not posted.

Q. Surely during the last thirty-five or thirty-six years you have had some opportunity to know if it is anthracite or semi-anthracite or bituminous.

[fol. 287] A. Well, yes. Well, according to my best judgment, it is semibituminous. I have seen analyses that showed it as semibituminous.

Q. What part of the state of Arkansas is Clarksville in?

A. It is in the northwestern part. It is about sixty-five miles east and a little bit south of Fort Smith.

Q. Traveling from the Oklahoma border, coming eastward, what particular field do you go over?

A. Starting in the middle of the coal field down there?

Q. Starting from the Oklahoma line. That is your western end of your state, isn't it?

A. I would say you would first come into Excelsior, Jenny Lind, Charleston, Paris, Denning, Spadra, Bernice.

Q. You stated that there is a difference in the hardness of the coals of the different fields of the State of Arkansas; on direct examination by Judge Riddle?

A. Yes, sir.

Q. Doesn't that hardness increase with some degree of constancy from west to east?

A. Yes.

Q. Is there a marked difference in the hardness of the coal from the west to the east?

A. No, the difference is very slight.

[fol. 288] Q. Can you state any other characteristics of the coals from the eastern to the western parts of your field?

A. Not much difference. It just gradually goes—the volatile gradually gets a little bit lower to the east.

Q. The volatile gets a little bit lower as you go eastward?

A. Yes, sir.

Q. And the fixed carbons increase as you go eastward, is that correct?

A. I believe that it does. I am not just positive about that, but the volatile does.

Q. You stated in your direct examination that you have read many analyses of the coals of this state?

A. The only analyses I have read has just been in geological surveys and in the bulletins put out at Fayetteville. I have not read a large number of them.

Q. Would you say that the ratio of one to six volatile matter, fixed carbons, as you go eastward would be a fair difference between your eastern and western coals of your state?

A. You mean to take this section of the state as a whole, is one to six—

Q. (Interrupting.) Would you say that the volatile matter would be one-sixth of your fixed carbons as you go eastward?

[fol. 289] A. I think that that possibly would not be far wrong. It may possibly be lower. That would not be far wrong.

Q. Would it go as high as one to nine?

A. One to nine? I have not seen anything that would—like it would go to that. I noticed one geological survey that said semi-anthracite had a ratio of above eight—from eight to twelve.

Q. Semi-anthracite; you say semi-anthracite?

A. Semi-anthracite.

Q. One to twelve?

A. One to twelve. I would say about eight percent.

Q. Oh, I see. You are not speaking of ratios, you are speaking of percentage?

A. Percentage.

Q. I thought you said you saw some paper that showed one to twelve?

A. No. I said the percentage of volatile to fixed carbon would be from eight to twelve. There is nothing that I have seen in Arkansas that will come up to that standard of classification.

Q. Could you give me an idea of what standard analyses would show from prominent fields, westward-eastward?

A. Well, I just haven't looked over this carefully and [fol. 290] have not tried to memorize. There are so many different analyses and they vary quite a lot. You take in the Spadra field. You take three or four samples from the same mine and in different places and they will vary.

And in the field, in the different mines, they might take the whole bunch and put them together and there might not be much variation, but in the mine in different places the coal varies, it is not just even all over. There are fields where there will be impurities and things like that that will cause a difference in analyses right in the same mine and in the different mines in the same field.

Q. I do not want you to find yourself out in too deep water. If I am going into too deep water for you, call me on it. You are an expert producer and I feel I can give some credence to your opinions. Getting back to these characteristics of your coal; is there a marked a decided marked difference between western and eastern coal?

A. In the state?

Q. Yes; sir.

A. No; sir, there is not.

Q. And what types of coal do they mine in the state here?

A. It is all smokeless. I think in Arkansas—I don't remember of seeing a volatile that ran above something like [fol. 291] sixteen. And the volatile in Spadra will average as much as eleven and I think possibly might run up to twelve. I think that there may be as much as four percent variation in the volatile. That is just a guess.

Q. You say that the Spadra volatile will run around twelve?

A. I say it might average eleven.

Q. Might average eleven?

A. I believe it will come nearer averaging twelve if you will just go and take samples all over. You can pick some examples that will run lower than that, but I notice from the University of Arkansas they took eighteen samples and made analyses and then they put those together in one batch and the volatile was above twelve.

Q. Mr. Collier, what would you say would be the average in fixed carbons then?

A. In fixed carbon I would say it would be seventy-six to seventy-eight.

Q. Where you had twelve of volatile matter?

A. Yes, sir.

Examiner Newcomb: That is all, thank you.

Mr. Riddle: Just one more question, please.

By Mr. Riddle:

Q. Do you in your mining operations have to use any of the mining tools that are used in the mining of anthracite [fol. 292] coal?

A. I don't know what they use in mining anthracite.

Q. For instance, any drill holes? Do you use any of the drills that were described here yesterday that they had to use in the anthracite veins?

A. No, we don't use that.

Q. You just take a common brace drill and go right into it?

A. We have an auger just like a brace and bit. It has a brace comes back next to the body and they take that and push it right into the coal.

By Examiner Newcomb:

Q. Do you know what the term "agglomerating" means?

A. No, sir, I do not.

Examiner Newcomb: That is all. Thank you.

(Witness excused.)

Examiner Newcomb: It is now twelve o'clock. We will take a recess until 1.30.

(Whereupon, at 12:00 o'clock noon, a recess was taken until 1:30 p. m. of the same day.)

[fol. 293] Afternoon Session

(The recess having expired, the hearing in the above-entitled matter was reconvened at 1.30 o'clock p. m. of the same day, and further proceedings were had therein as follows:)

Examiner Newcomb: You may proceed.

Mr. Riddle: Mr. Denman, take the stand.

Examiner Newcomb: Be sworn, Mr. Denman.

HEBER DENMAN, Chairman of District Board 14, was duly sworn and testified as follows:

Direct examination.

By Mr. Riddle:

Q. State your name.

A. Heber Denman.

Q. How old are you?

A. Sixty-nine.

Q. What business are you in?

A. Coal mining.

Q. Where have you been engaged in coal mining?

A. Well, I graduated—

Q. State briefly your entire coal experience.

A. I graduated from Lehigh University in 1882 as a mine engineer, and while there I worked in the anthracite field in Pennsylvania on the engineering department of the Lehigh & Wilkes-Barre Coal Company. When I graduated [fol. 294] I went with the Berwind-White Coal Mining Company at Punxsutawney, Pennsylvania, in the engineering department, and I stayed with them for six years and became chief division engineer of the Windber district in Pennsylvania. I went from there to Indian Territory in 1898. That is while Oklahoma was territory. And a man named Bache and myself leased two of the mines of the Choctaw, Oklahoma & Gulf Railroad Company. Finally we leased all of the mines of the Choctaw, Oklahoma & Gulf Railroad Company and operated the mines at Hartshorne and near McAlester until the Choctaw, Oklahoma & Gulf sold out to the Rock Island. Then we came with the Choctaw, Oklahoma & Gulf people to Arkansas and they built the Midland Valley Railroad and while we were with the Midland Valley Railroad Company a man named Bates and myself bought out a mine and we were in the mining business until we got in trouble with the union. We had our plants burned down. Then I went back to Pennsylvania with the Berwind-White Coal Mining Company as assistant general manager of the Windber district, and I stayed there until after we had—and then I came back with Bates-Denman Coal Company and then I became consulting engineer for Mr. Puterbaugh for about a year and finally I became general manager of the Arkansas Mining Company in the Spadra field. I operated the Fernwood No. 1 and 2

for about twelve years and then I became interested in the [fol. 295] Paris field, and I am now an operator in the Paris field of Logan County, Arkansas, and chairman of the Board of District 14.

Q. Are you acquainted with the various coals in the State of Arkansas?

A. Yes.

Q. What coals have you here in Arkansas?

A. Well, we have what I term a semi-bituminous coal, with certain variations. Oh, according to my view, it is all in the semibituminous class.

Q. You have operated in Arkansas and Oklahoma how many years of your life?

A. Well, I came to Indian Territory, which is now Oklahoma, in 1898 and I have operated from 1898 to the present time. Well, the first six years was entirely in Indian Territory and from then on why, it has been in Arkansas except one year back in Pennsylvania.

Q. Will you explain the geological formation of the Hartshorne seam of coal, its characteristics and variations and its mining location?

A. Well, the entire coal fields of eastern Oklahoma and Arkansas are in what is called the Hartshorne measures. The Hartshorne vein or the lower Hartshorne vein comes just above the Hartshorne sandstone and that covers that [fol. 296] entire area. And there are a number of veins, there are several veins that come above the Hartshorne vein, but most all the coal in the entire area comes from the Hartshorne veins.

Q. How do the geologists identify, if you know, the Hartshorne vein geologically?

A. Well, it comes in what is called the Pennsylvanian series of the carboniferous area, but it is identified from a position in relation to this Hartshorne sandstone. It is pretty easily identified all through the district.

Q. All through Arkansas?

A. And eastern Oklahoma. All the way from McAlester and beyond McAlester to Russellville.

Q. Is the coal being mined now in the Spadra field produced from the Hartshorne vein?

A. Yes, all the coal in every mine in the Spadra field is on the Hartshorne seam.

Q. And that seam is generally known and recognized as bituminous or semibituminous coal?

A. Well, not strictly bituminous coal. It is a semibituminous. It is a better grade than bituminous coal. Now, the coals of Kansas we classify as bituminous, but it is a higher grade than Kansas coal, and I think it comes and I classify it as semibituminous coal. It is a grade higher than just plain bituminous.

[fol. 297] Q. What percent of the coal in District 14 is taken from the Hartshorne seam?

A. It is pretty hard to say offhand just what percent, but I should say about ninety percent.

Q. You have observed these exhibits, the different pieces of coal that have been introduced in evidence, have you, Mr. Denman?

A. Yes, I have observed some; I have not observed them closely. I have just noticed the coal around the room.

Mr. Machugh: May I suggest that you indicate whether the exhibits you introduced or the ones introduced by the Commission?

By Mr. Riddle:

Q. The exhibits I introduced here this morning; you have examined those, have you not? They have wrapped them up for the purpose of shipment.

A. I have examined a few of them. One of those, by the way, came from our mine.

Q. Is there any coal in these exhibits except bituminous coal and semibituminous coal, in your judgment?

A. In my opinion, they are all in the semibituminous class.

Q. As to Exhibit No. 1 where would you put that? That is anthracite?

A. Well, as I stated, I have not examined all these.

Q. Exhibit 1 is the little piece, Commission's Exhibit [fol. 298] No. 1. What kind of coal is that?

A. That is Pennsylvania anthracite.

Q. Do you have any coals comparable to that in this state?

A. No.

Q. In District 14?

A. No.

Q. What coals, if any, do you come in competition with in the market?

A. I beg your pardon?

Q. What coals, if any, do you come in competition with in the market?

A. Well, we come in competition with other smokeless coals from the state of Arkansas and we also come in competition with Pocahontas coal. The coal that is worrying us most right now is up in the Twin Cities, that is Minneapolis and St. Paul, and that is Pocahontas coal.

Q. With reference to prices, do you compete with any other coals seriously except Pocahontas, which is a semibituminous coal—is that true?

A. Well, we compete with all the surrounding coals; we compete to a certain extent, not a very great extent though, with Spadra coal and we compete with the coal—now, I am speaking for the Paris field now. Our coal competes [fol. 299] with other coals from Arkansas and from eastern Oklahoma that are all similar in character.

Q. Have you got any further reasons to give the Examiner as to why this is a semibituminous coal instead of an anthracite coal?

A. Yes, I have other reasons.

Q. Give them to the Examiner, please.

A. Do I have permission to read the data I have into the record?

Examiner Newcomb: Yes, sir.

A. This data was selected from different bulletins from the Department of the Interior, United States Geological Survey, and publications gotten out in Arkansas.

By Mr. Machugh:

Q. May I ask, Mr. Denman, who prepared the document from which you are reading?

A. Different ones prepared the original documents, but copied extracts from different documents, which I have enumerated in this paper.

By Mr. Riddle:

Q. This is the result of your own investigation?

A. Yes, sir. I had a local stenographer write this out, dictated to her out of these publications which I refer to and which I am about to read into the record. The first publication I read from, Bulletin No. 326, Department of the Interior, United States Geological Survey, the title [fol. 500] being, "The Arkansas Coal Field," by Arthur J. Collier, page 84: Classification of the coal. (Reading.)

"The classification of coal into the various grades recognized in trade, based primarily on their physical properties and their adaptability to particular uses, coincide approximately with a classification based on the degree of alteration from their original woody character, coal of the lowest grade being lignite, while the most highly metamorphosed coal is anthracite. This classification is indicated by approximate chemical analyses showing the proportions of fixed carbon, volatile matter, water, and ash, which they contain.

"In the original Pennsylvania classification proposed by Persifor Frazer, Jr., anthracite coals have fuel ratios above twelve, semi-anthracite coals from twelve to eight, semi-bituminous coals from eight to five, and bituminous coals from five to one."

In the above classification, fuel ratio means the ratio between the amount of fixed carbon and volatile matter and is determined by dividing the percentage of fixed carbon by the percentage of volatile matter. On page 88 of this bulletin a table reading as follows: (Reading)

"Approximate analyses of Arkansas coals made by the Geological Survey of Arkansas, analyses by R. N. Brackett, assisted by Mr. J. P. Smith." I quote analyses from samples No. 25 and No. 26, being taken near Clarksville. [fol. 301] "Sample No. 25, Mason Drift, Clarksville, section 27, township 10, north, range 23 west. Moisture 1.12; volatile matter 11.01; fixed carbon 80.86; ash 5.86; sulphur 1.46; fuel ratio 7.34. Sample No. 26, Harkreader's well, Clarksville, section 34, township 10, north, range 24 west. Moisture 1.56; volatile matter 10.35; fixed carbon 78.91; ash 6.31; sulphur 2.87; fuel ratio 7.62."

This is my notation. You will note that the fuel ratio of these two samples are 7.34 and 7.62 and neither of these analyses show this coal to be in the semi-anthracite class but in the semibituminous classification as quoted by Mr. Arthur J. Collier. Now, this is my comment. This survey of the coal fields of Arkansas by Mr. A. J. Collier is one of the most comprehensive and thorough surveys of the Arkansas coal fields made to date.

No. 2. I quote from "Outlines of Arkansas' Mineral Resources," by George C. Branner, State Geologist, dated 1927. By the way, Mr. Branner is still State Geologist for Arkansas. On pages 108 and 109, it reads as follows:

"Classification of Arkansas coals reading as follows: (Reading)

"One of the most commonly used classifications of coal is that produced by P. Frazer, Jr. This is based on the relation between amount of fixed carbon and the volatile combustible matter, fuel ratio, in the coal, and is given as [fol. 302] follows: Anthracite, above twelve; semi-anthracite twelve to eight; semibituminous eight to five; bituminous five to zero.

"Thus an anthracite is a coal containing more than twelve times as much fixed carbon as volatile combustible matter. This table does not provide for lignite, which has a fuel ratio of less than one. As understood by the trade, the limits are usually somewhat lower than these given."

On page 109 you will find two analyses. No. 3368, from near Spadra, and No. 3369, from Clarksville.

"Spadra: Moisture 2.11; volatile matter 11.42; fixed carbon 77.83; ash 8.64; sulphur 1.99; b.t.u. 13,714; fuel ratio 6.82. Clarksville: Moisture 1.72; volatile matter 10.46; fixed carbon 79.50; ash 8.32; sulphur 2.49; B.T.U. 13,867; fuel ratio 7.59.

"The fuel-ratio shown by the analysis of these two samples are as follows: 6.82 and 7.59, neither of which fuel ratios would allow this coal to be classed as semi-anthracite, but would put them in the semibituminous class." These analyses were copied from Bulletin 326, which I have already quoted, but I call attention to these analyses taken from the book written by George C. Branner, in order to show that the State Geologist has adopted and prescribed to the classification as laid down by Persifor Frazer, and also adopted by Arthur J. Collier of the United States Geological Survey.

[fol. 303] Page 3. I read from "A Study of Arkansas Coals," written by L. C. Price, Bulletin No. 5, Engineering Experiment Station, Fayetteville, Arkansas. On page 12, I read as follows: (Reading)

"Tables of analyses. The following tables give the location and character of each mine from which samples were tested, and the analysis of each sample on the basis of the coal as received, dry coal, and combustible. Table 3 gives the character of the mine and its location with reference to the nearest town, and also a sample number. Table 4 gives the analysis corresponding to each laboratory num-

ber. Table 2 gives the towns near which samples were taken and the numbers of samples from each."

Samples 804 to 818 were taken from near Clarksville, all of which locations are included in the Spadra coal field, and have the same character of coal.

On page 21 is shown the analyses of the samples taken from the location just mentioned. There are in all fifteen analyses. I have averaged the volatile matter and fixed carbon on these fifteen samples and figured the fuel ratio. The fuel ratio of these fifteen samples of Spadra coal, on the basis of coal as received, equals 5.82, and on a dry basis 5.9, both of which fuel ratios bring this coal within the class of semibituminous coal and not semi-anthracite.

[fol. 304] I quote from "Geology and Mineral Resources of the Western Part of the Arkansas Coal Field," Geological Survey Bulletin 847-E, United States Department of Interior; written by T. A. Hendricks and Bryan Parks. On page 211 there is shown analysis of coal from three of the principal mines in the Spadra coal field, there being three samples of coal taken from each mine, and the analysis made of each, and then a composite analyses made of the three samples from each mine. The mines from which the samples are taken are the Sterling Coal Company located about two miles south of Clarksville; the McAlester Fuel Company, Fernwood No. 2, located about six miles west of Clarksville, and Clark & McWilliams Coal Company located about one-half mile northwest of Fernwood No. 2. All of these mines are located on the lower Hartshorne bed of coal. I averaged the volatile matter of the composite samples from the three mines, also the fixed carbon of the three composite samples. The fuel ratio for these analyses is 7.3, both as received and on a dry basis. This would not allow the coal from these mines to be classed as semi-anthracite, but would place them in the semibituminous classification. These mines are representative mines of the Spadra coal field and are probably its largest producers. Two of these mines are towards the west end of the Spadra coal field, while the Sterling Coal Company is near the east end of the Spadra coal field. The Sunshine [fol. 305] mine lies near the center of the Spadra coal field. All mines in the Spadra coal field are on the lower Hartshorne seam of coal.

I read from "Minerals in Arkansas," published by Jim G. Ferguson, Commissioner, Bureau of Mines, Manufac-

turers and Agriculture, Little Rock, Arkansas. Refer to page 48, reading as follows: (Reading)

"Mine face samples of Arkansas coal. The analyses given 'as received' values; that is, the analysis shows the character of the sample as it is received at the laboratory in an air-tight container, sealed in the mine location: Spadra. Laboratory number 2587. Moisture 3.12; volatile matter 11.39; fixed carbon 77.03; ash 8.46; sulphur 1.84; B.T.U. 13,793."

The above is an analysis of a sample of coal from the Spadra coal field, sample No. 2587. This analysis shows a fuel ratio of 6.76, which classifies this coal as semi-bituminous.

Now, that ends my list of analyses which I have submitted.

Q. Have you anything further to offer in support of your position that all of the coals in the Spadra field are semi-bituminous and also that there is no anthracite coal in this state or semi-anthracite coal?

A. I do not think that there is any, either anthracite or semi-anthracite coal, in the State of Arkansas, although [fol. 306] there is one mine at Russellville that comes very close to the line of semi-anthracite.

Q. Now, do you have a contract with your miners that you are operating under now?

A. Yes, sir, we have the regular contract.

Q. Bituminous coal contract?

A. Yes. It is the contract that covers practically the whole United States, through Mr. Lewis.

Q. Have you ever accepted Pennsylvania anthracite?

A. I did not.

Q. Have you ever had a contract which provided for the scale paid anthracite miners in Pennsylvania?

A. No, sir, I have had.

Q. That has not been true for the last thirty or forty years, that there is a separate contract for the mining of anthracite coal and for the mining of bituminous coal?

A. Not in the State of Arkansas.

Q. You have never had anything but a contract for the mining of bituminous coal in this state, have you?

A. No.

Q. And so far as contractual relations are concerned, it all on a bituminous coal basis?

A. We all contract with one union.

Mr. Riddle: That is all.

[fol. 307] Cross-examination.

By Mr. Gregory;

Q. Mr. Denman, does your 'miners' contract specify whether or not the coal is bituminous or anthracite, or any other kind of coal?

A. No, sir, it does not specify, but it is the same contract that all the bituminous fields sign.

Q. Is that the same contract that they have in the fields of comparative distances, such as Utah?

A. I don't know just what the contracts of Utah are.

Q. Is there any connection between your wage contract and the wage contracts in Utah?

A. I don't know that there is.

Q. Mr. Denman, do you sell any lump coal out of your Paris mine?

A. Yes, we sell a little lump coal.

Q. Do you sell a good — more lump coal than you do egg coal or nut coal?

A. Yes, we sell some. Well, generally we sell more but there are times that we have a demand for some coal that we call furnace coal. Then we break it down smaller in order to make more furnace coal.

Q. Most of your shipments for domestic use are of lump coal, is that right?

[fol. 308] A. The greater portion of it, yes, sir.

Q. Do any of the Spadra operators ship any lump coal for domestic consumption?

A. When I operated in the Spadra field——

Q. (Interrupting) I am speaking about the present time.

A. I cannot say. I have not been operating over there for several years and I don't know; I could not say.

Q. I do not believe you have any price schedule on lump coal in the Spadra field, have you? We are just trying to get at the facts.

A. Not that I know of. I do not know of any.

Q. You do not honestly believe that there is any lump coal shipped out of the Spadra field, do you?

A. I don't believe there is.

Q. Just as an honest question?

A. No, I don't believe that there is.

Q. Do you want to comment on why that is true?

A. Well, they don't enter into that business, one reason.

Q. Will Spadra coal burn as a lump coal? Is it a satisfactory furnace fuel?

A. I think it will burn all right, but the Spadra coal is used for small stoves and domestic furnace coal, and there is an objection to having big lumps of coal to load into the [fol. 309] furnace, just the same as there is an objection now to Paris coal being made in big lumps. The Paris coal when in big lumps don't go into the cities. It is a small lump and furnace coal.

Q. They do not burn that big lump in the stoves, do they—your lump coal; they don't burn that in furnaces?

A. No, I don't think they do, because that one size of lump, they would have a hard time getting it into a furnace.

Q. Do they burn it in stoves?

A. No, sir.

Q. How do they burn it?

A. I think they break it up and probably burn it in stoves. But the ultimate consumer, I don't know very much about.

Q. The fact of the matter is Spadra coal won't burn as lump coal as Paris coal? Isn't that the truth?

A. No. I am telling you the truth right through.

Q. I know you are.

A. But if you would get a big enough ball of Spadra lump together it would burn as lump, but you cannot put two lumps of any coal, put them side by side, and make it burn. You have got to have a mass so that the flames go licking around the sides of each chunk of coal.

Q. I think we both understand what we are getting at. [fol. 310] Do you sell any of your Paris coal or is any coal sold out of that field for railroad use?

A. From the Paris field?

Q. Yes, from the Paris field.

A. Well, there is a small amount. We sometimes sell a little coal to a local railroad.

Q. Is there any of it sold for steam use?

A. Well, of course that would be for steam use.

Q. I mean your screenings?

A. Yes, the Paris coal, some of it is sold. For one thing, we supply the light plant in Paris, and some of it goes to the oil mills.

Q. Is there any Spadra coal sold for railroad or steam use?

A. I cannot say about that. I think there has been, the small sizes, but at the present time I am not closely in touch with that field.

Q. I do not want to embarrass you on that, Mr. Denman. You have been very straight forward in all of your dealings. I want to put that on record. I am not trying to embarrass you. I am trying to find out the truth and I think if there is any chance of getting it I will get it from you. I have one or two more questions I would like to ask you. There has been a great deal of testimony here of various kinds [fol. 311] for a couple of days that there was no difference between these coals, no effectual difference. Now, you are chairman of the Bituminous Coal Producers Board for District 14, aren't you?

A. Yes, sir.

Q. You have a price of \$5.75 on Spadra $2\frac{1}{2} \times 1\frac{1}{4}$ nut coal. That is your proposed price to the Commission. You have got a price on your nut coal from Paris, of the same size, of \$2.40.

A. I believe that you are mistaken about the same size.

Q. The Spadra is inch and a half by seven-eighths, \$5.75. The Paris is inch and a quarter by seven-eighths. That is substantially the same size, isn't it? Your price is \$2.40 and the Spadra price is \$5.75, on a twenty-five cent higher freight rate. Will you tell us honestly why that is?

A. I do not contend that all the coals that are—I do contend that all the coals in this district come into the same general classification, but I do not contend that all the coals are the same. In fact, the Board in classifying these coals made a differential, due to the different characteristics, but still the characteristics are not enough different to put them, some into an anthracite and some into a subbituminous. They are all pretty close together but there is a [fol. 312] difference between the coals. Now, that seems like a wide spread, but Spadra coal has been on the market for a great many years, probably from—well, many years back, as a domestic coal, at a time when the rest of Arkansas was just making lump coal and slack. Now, the Paris field has only recently been making the small sizes, and when you first go on the market you cannot put a coal, a new coal on the market at the same price as coal that has been established on the market for many years. Now, I would

not be surprised in a few years if we would raise the price of those smaller sizes. Now, in the next place, in the Spadra field they pick and prepare those smaller sizes. Over at Paris the smaller sizes get very little preparation. Most of them just screen it and dump it into the railroad cars. Over in the Spadra field I know of one operator that washes all those small sizes. His better preparation will get him a good deal better price than a coal that is just dumped right into the railroad cars.

Q. Mr. Denman, you honestly believe that this difference in preparation is the sole difference in the price of \$5.75 on the Spadra coal and \$2.40 on the Paris coal, on the same size?

A. I do not maintain that all the coals in Arkansas are just alike. There is no doubt, and the analyses show it, [fol. 313] there is a difference between Spadra coal and Paris coal. It is not a great difference. But Spadra coal does come nearer to being semi-anthracite than Paris coal does. And their coal is a little harder than Paris coal, and there is naturally a difference in the price due to that, but that does not mean that there is enough difference to put Spadra in a geological classification or in a class above Paris. I think that they both belong; all the coals in Arkansas, in a semibituminous class, unless it is the coal at Bates. But there is a difference in the hardness of the coal in the different parts of this field and there is a difference in the amount of fixed carbon; there is a little difference in the amount of volatile matter. But the point I want to stress is that there is not enough difference to raise Spadra coal into the semi-anthracite class.

Q. Do you think your nut coal or small coals of comparable size are satisfactory and substantially the same for use in base burners or brooders as Spadra coal?

A. No, sir, I do not think they are. I think our coal gives a little bit longer flame and is probably a little bit softer, but it will do probably the same as Spadra coal if it was well cleaned and sized.

Q. Then your sole reason for this difference of approximately one hundred fifty per cent in prices is in the preparation, is that right?

[fol. 314] A. No, I have admitted that there is a difference in the coals. I have tried to bring out that there is some difference.

Mr. Gregory: That is all, Mr. Denman.

By Mr. Riddle:

Q. Just one more question and then I will be through. Do you know that the prices quoted by the gentleman are the ones recommended by this Board?

A. No, I do not. I don't know, but I know there is a difference in the prices between the two coals.

Q. Yes, but the ones that you fellows proposed; do you know that he is quoting from the right price list there?

A. No, I do not know that.

By Mr. Patterson:

Q. Just one more question, please, sir. Your testimony with reference to the geological make-up of the coal has been based practically entirely from the excerpts you have read on fuel ratio of coal, has it not?

A. That is the system of classification that I have chosen. It is the same as chosen by the State Geologist and also by the United States geologist, A. J. Collier.

Q. That is not a classification then with reference to the [fol. 315] fixed carbon?

A. How is that?

Q. That is not a classification then with reference to the fixed carbon?

A. Yes, it is a classification with respect to the fixed carbon but not with respect to the fixed carbon alone.

Q. Mr. Denman, I hand you Exhibit M, which appears to be information circular 6933, Bureau of Mines, and ask you if — would mind reading that paragraph into the record there, just that paragraph, please, sir?

A. (Reading) "For classification of coal according to rank, fixed carbon and B. T. U. shall be calculated to the mineral-matter-free basis in accordance with either the Parr formulas one, two or three, or the approximation formulas four, five and six given below. In case of litigation the appropriate Parr formula shall be used."

Q. There is no mention there of fuel ratio, is there, Mr. Denman?

A. No, sir. This is only one of the many systems of classification. I read an article, a technical article, on classification, during the last few days, and I think that there were five different and separate methods of classification. Some [fol. 316] of those are so intricate that no coal man could ever wade through them. One of them was based on the number

of ulmins in coal, based on the oxidation of the ulmin. Very few people ever know what an ulmin is. This system of classification has not been proven that it is any more authentic than some of the older classifications. It is simply gotten out by a certain society and it has been adopted. But the system that I quoted has been also adopted by some of the greatest geologists that ever investigated the coal fields of Arkansas, like A. J. Collier, who probably was one of the most able geologists in this field, and also Joseph Taft, who was on the United States Geological Survey for Indian Territory.

By Mr. Gregory:

Q. Mr. Denman, your proposed price to the Commission on slack coal is about eighty cents, isn't it?

A. Eighty cents, as I recollect it.

Q. The Spadra proposed price is \$2.50?

A. Yes.

Q. Will you tell us frankly what the reason is for that?

A. Yes, I can tell you that. As I have stated several times, there is a difference. In the first place, Spadra slack has very slight coking properties. In other words, it does not agglutinate.

Q. It has none at all?

[fol. 317] A. Yes; it is very slight. Now, I burned it for twelve years and sometimes it has a slight tendency to coke, but it is slight. On the other hand Paris coal has a greater tendency to melt, enough so that the smelters cannot use the flux because it has that coking property. It has to a slight extent that coking property.

Q. And isn't that true of all our coal in this field outside of Spadra?

A. Well, no.

Q. Do you know of any other coal in this district?

A. Well, of course, Russellville is non-agglutinating.

Q. That is part of the anthracite field?

A. Also the dead coal. There are a lot of dead coals in this county that is bought by the smelters, that can be used as a flux.

Q. But the coal in a normal status, produced by the mines in this district, do you know of any other outside of Spadra?

A. Well, last year we shipped to the Ozark Smelting & Mining Company four thousand tons of Paris slack.

Q. Wasn't that because they could not get enough Spadra slack?

A. Yes, that was the reason.

Q. Then the price was much lower than the Spadra, wasn't it?

[fol. 318] A. Yes, the price was much lower. I do not contend it is as suitable for that purpose as a slack that has a less tendency to coke.

Mr. Gregory: That is all.

By Mr. Machugh:

Q. Mr. Denman, I believe you said that you are an operator in the Paris field at the present time?

A. I am.

Q. How far apart are the Spadra and Paris fields, in distance?

A. Well, the Spadra field crosses the river. The fields themselves, I suppose, would be ten or fifteen miles apart. From Paris to the town of Clarksville, I guess, is about, close to thirty miles, right straight across.

Q. What is the name of your company?

A. The Paris Purity Coal Company.

Q. How many mines does that company operate?

A. That company operates just one mine.

Q. What is your position in that company?

A. President.

Q. How long have you been president?

A. Ever since the company was formed, in about 1922.

Q. What is the annual production of that mine?

A. It runs about fifty to sixty thousand tons a year.
[fol. 319] Q. Did that apply to the year 1936?

A. We got out fifty-three thousand in 1936.

Q. What percentage of that production is shipped out of the State of Arkansas?

A. About ninety-eight percent, I should think.

Q. And in what territory is it sold?

A. We sell a few cars in Arkansas, we sell a few cars in Texas, and we sell considerable quantity in Missouri, we sell a considerable quantity in Nebraska and South Dakota and Iowa and Minnesota. I think we have gotten a little up into North Dakota.

Q. To what class of consumers do you sell your coal?

A. It is practically all domestic coal except the smaller sizes and the slack.

Q. Do you sell to any industrial consumer?

A. We have shipped some coal to power plants. We used to ship to Sioux City, Iowa. We used to have a contract or we shipped on a contract there.

Q. How long ago was that?

A. I think that is about—I think we shipped—we may have shipped a little last year, but about two or three years ago is when we shipped most of that coal.

Q. Are you able to give the name of that consumer?

A. No, I cannot right offhand give the name. There is a man here that we shipped through, the Southern Coal Com-[fol. 320] pany. I think we shipped that through the Southern Coal Company and I think a representative of the Southern Coal Company is here.

Q. Perhaps you can find that out later and you could submit it later?

A. Sioux City Gas & Electric Company.

Q. Are you able to name any other typical representative consumer of your company?

Mr. Riddle: I don't understand what that has to do with this hearing.

Examiner Newcomb: Mr. Machugh represents the Consumers' Counsel's office and he is interested in anything that concerns Consumers or the consuming market. The objection is overruled.

A. The only consumers that I can recollect are some local consumers just for the small coal. We have supplied the Subiaco Railroad Company with some coal for their engine use. That is a road running from Paris to Dardanelle. And we have supplied the electric plant, the municipal electric plant in Paris, with some small coal, above slack, and some chestnut. And we supply the oil mill at Morrilton, Arkansas, with some slack. But now the bulk of our coal is sold through wholesalers, who sell it to retail dealers, and it is sold by the retail dealers to the small consumer, and so as a producer we don't know much about the ultimate consumer of our coal.

[fol. 321] Q. Are you able to state what effect the granting of the exemption to the Sunshine Coal Company in this proceeding may have upon the consumers of your company?

A. Well, in the long run I think it would be to the benefit of the consumer. If the intention of this law was to stabilize prices, not allow one operator to cut under the other—when

one operator is allowed to cut under all the other operators, at times the prices go very low and the consumer at that time gets low prices, but then, of course, when cold weather comes on they just shoot right up. My idea of the intention of this law was to stabilize prices, more uniform prices, never so low and never so high, and in my opinion in the end it is better to have the prices stabilized by some power—some one that has the power to stabilize the prices. The operators themselves cannot stabilize prices, and I believe in the long run it is better for the consumer to have a stabilized price, and this law tends to stabilize these prices. Now, at the present time there are not many orders for coal, and I think that one reason for that is that they think that there is going to be lower prices offered and they are holding off. Now, the company that is asking for this exemption, I have heard or I understand—in fact, I have been told by some of the jobbers that people are expecting from them a lower price of coal and they are holding off [fol. 322] buying this coal and that is hurting the other operators. And, of course, when you hurt the other operators you hurt their employees; it makes lack of work. At the present time the orders are pretty scarce all over this district.

Q. Have you anything further to say with respect to the effect upon the consumers?

A. No, I have nothing further.

Q. Mr. Denman, I believe you said that there was one mine in Arkansas that comes close to being classed as semi-anthracite; did you testify to that effect?

A. I did.

Q. Was that the Sunshine Anthracite Coal Company?

A. No, it was not. It was not a mine in the Spadra field.

Q. What was the mine?

A. The mine was the Bernice mine in the Shinn Basin near Russellville, Arkansas.

Q. I believe in answer to one of Mr. Riddle's questions you referred to the competition in the Twin Cities which really worried you, or something to that effect.

A. Yes, sir.

Q. Would you mind explaining what you mean by that?

A. Well, our principal competitor outside of among our [fol. 323] selves is coal from West Virginia, the Pocahontas field. Last year we had a lower price in the Twin Cities than Pocahontas coal, and it is necessary for us to have a

lower price in that field in order to compete with them. This year the price in the Twin Cities, due to their stopping up the docks with coal, has been lower than our price and we have had very little business in the Twin Cities. Usually at this time of year we are shipping lots of coal to the Twin Cities, but this year we are shipping practically none due to the competition of Pocahontas coal—not directly from the mines but I think that the producers in West Virginia, anticipating these things, sold a lot of coal to the dock companies, which I believe are controlled by the producers although they are different corporations, and the dock companies have been shipping this coal into Minneapolis and St. Paul at a lower price than ours and I has cut us out of considerable business.

Q. Have you anything further to say with respect to that situation?

A. Not anything further.

Q. Just one or two more questions. You referred to Arthur J. Collier of the United States Geological Survey. Do you know what his position is in that organization?

A. No, I don't know what it is now. I met Mr. Collier when he was out here. When I met him he was head of the [fol. 324] Survey, making a survey of the coal fields of Arkansas.

Q. Does he still occupy that same position?

A. I do not know. I have not heard from him in a great many years, for a number of years.

Q. Now, if my recollection serves me correctly, with respect to those several documents from which you quoted, you gave the titles and bulletin numbers, but there was no date with respect to any one of those documents, and I did not wish to interrupt you at the time. The record, of course, will show whether my recollection is correct.

A. I don't know that I gave the dates. I think I can furnish you with those dates, if you wish to have them. There are men here, however, that can testify—one of them that worked with Mr. Collier—and he can probably testify in reference to when this survey was made by Mr. Collier.

Q. When was that survey made; are you able to tell us approximately?

A. I am not able to answer that right offhand.

By Mr. Waldron:

Q. You have given the exact numbers of the bulletins in the record, in your testimony, have you not?

A. Yes.

Q. And what it contained?

[fol. 325] A. Yes, the title of it.

Q. And if a person was interested, by referring to that number and asking for the document, the date will appear on each and every one of the documents referred to?

A. It does. That is correct. I just omitted to put in the dates.

Q. But a reference to the document will give the date to anyone interested?

A. It will.

Mr. Waldron: That is all.

Mr. Machugh: Those are all the questions I have at the present time. Thank you very much, Mr. Denman.

By Mr. Gregory:

Q. Mr. Denman, you mentioned awhile ago that the greater value of the Spadra coal as compared with Paris coal was because of the fact that the Paris coal was slightly coking and the Spadra coal was not?

A. Yes.

Q. Now, is it not true that the Pocahontas coal which you mention is much stronger coking than Paris?

A. Yes, that is true. That is true. It is much.

By Mr. Patterson:

Q. Mr. Denman, the bulletins and documents you refer to, are they all now in print so far as you know?

A. So far as I know, they are, yes. I will state that one [fol. 326] of those was as late as 1928. I think that was the one from the—well, that is the United States Geological Survey, by Hendricks. I think probably that was even later than that.

Q. I do not want to keep you, Mr. Denman, but I believe your testimony was at the beginning that the Spadra coal—you used this expression in answering the question, "That it was a better grade than bituminous." Is that the language you used?

A. No, I did not say "better". I said a higher grade.

Q. A higher grade?

A. But not high enough to go into a higher classification.

Q. But above bituminous?

A. Yes, above bituminous.

Mr. Patterson: That is all.

Examiner Newcomb: We will take a five-minute recess.

(Thereupon a brief recess was taken.)

Examiner Newcomb: You may proceed.

By Mr. Riddle:

Q. Mr. Denman, have you observed the National Bituminous Coal Act of 1937 excludes all the counties in Pennsylvania mining anthracite coal in District 1 and includes all [fol. 327] counties in Arkansas in District No 14?

A. I have noticed that it includes all the counties in Arkansas, yes.

Q. What effect would the exemption of these three applicants here have upon the coal industry of District 14 if it was granted?

A. You mean to exempt Johnson and Pope Counties from this law?

Q. These three applicants—they are all of them for that matter—just the three companies.

A. Well, I think it would have a very serious effect. In the first place, if these three companies were exempted from the provisions of this law the chances are they would make a lower price than the companies operating in this Act, this Bituminous Coal Act. That would force their direct competitors, the other operators in Johnson and Pope Counties, to ask for exemptions in order to compete. That would set up the very competition that it was the purpose of this law to evade; it would cut prices and it would disrupt the coal business.

Q. If they took in Pope and Johnson Counties both and excluded all of them, would it still have a very serious effect on the stabilization of the industry in this district?

A. Yes. The more that were exempted the greater effect [fol. 328] it would have. If only the three mines were exempted, it would not have so much effect. It would have a serious effect because it would force the others to ask for this exemption in order to compete with them.

Q. Assuming that all of this is semibituminous coal and these were exempted here; it would force the West Virginia

mines to file for exemption on the same basis, the same analytical basis or otherwise, wouldn't it?

A. No. I do not think that West Virginia would. Now, West Virginia coal has analyses that are just as high in fixed carbon as most of those cited in the Spadra field, but their volatile matter is higher and it makes a lower fuel ratio. They do not have as much reason to ask for it. West Virginia coal has never been sold as anthracite. It has always gone on the market as a high grade bituminous coal or semibituminous coal, a smokeless coal.

Q. It would effect the market and all the markets to which the coal from Arkansas is shipped, would it not?

A. I do not hear very well.

Q. I say it would effect all the markets to which coal is shipped from Arkansas, wouldn't it?

A. It would effect them, yes.

Mr. Riddle: That is all.

By Mr. Gregory:

Q. Mr. Denman, the other two companies that have asked [fol. 329] for exemption testified, I believe, that they produced some thirty-eight thousand tons of coal last year. You remember that testimony, do you?

A. Something about like that.

Q. If we were to produce another fifty thousand tons in a year in this Sunshine mine, that would give a total of eighty-eight thousand tons, wouldn't it?

Mr. Riddle: That is a mathematical calculation.

By Mr. Gregory:

Q. Now, isn't there a market for approximately eighteen million tons of coal in this territory that you have described that your coal is moved into?

A. There is a potential. You cannot get down to the exact figures.

Q. Isn't that approximately correct?

A. But there is no doubt a potential.

Q. I will put it another way. Isn't that the approximate consumption of this territory that you describe in your previous testimony as to states and territories into which your coal is moved? Isn't that correct? Doesn't that territory consume about eighteen million tons of coal a year?

A. I believe you are about right, but I cannot state whether that is right or not.

Q. Do you feel that this proposed production of eighty-
[fol. 330] six thousand tons from these three mines would have a serious effect upon the entire eighteen million tons?

A. No, I do not think it would have a very serious effect on the entire district of about seven or eight states, but it would have a very serious effect on the rest of the operators in the Spadra field.

Q. You are assuming all the time that these mines would sell the coal at lower prices than you or the other Spadra operators would want to quote?

A. I do not suppose the witness is allowed to question the attorney?

Q. No. That is just an assumption.

A. If you do not lower the prices, if there is no lowering of the prices and you operate just the same as if you were under this Bituminous Coal Act, I do not think it would do any harm, but there is no safeguard to keep you, after you got out from under this law, from cutting those prices. If you would make a contract under bond that you would live up to all the rules, if I was an operator in the Spadra field I would not object to you doing these things.

Q. You know that contract would be good, but we would not make any such contract and we would not make any assurances that we would maintain the prices.

Mr. Riddle: I move that be stricken out. It is all im-
[fol. 331] material.

Mr. Gregory: That is all.

Mr. Riddle: That is all.

Mr. Machugh: I have just one question, if the Examiner please.

Examiner Newcomb: Proceed, Mr. Machugh. (

By Mr. Machugh:

Q. Mr. Denman, if you please, Judge Riddle asked you what would be the effect of granting an exemption, if an exemption was granted to these three applicants. That line of questioning was followed by Mr. Gregory. Will you state for the purpose of the record who those three applicants are? I will ask you if you will name the three applicants to which you have been testifying in response to Judge Riddle's question.

A. The Sunshine Anthracite Coal Company, the Diamond Anthracite Coal Company, and I think it is the D. A. McKinney Coal Company.

Mr. Machugh: Thank you, Mr. Denman.

The Witness: Mr. Examiner, I wish to make a correction in my testimony.

Examiner Newcomb: Certainly, Mr. Denman.

The Witness: The attorney for the Consumers asked me the effect that it would have if these exemptions were allowed. Now, I think that is the question. I misunderstood [fol. 332] the question. My answer was the effect if the law was allowed to remain and they were denied the right of exemption. My idea is that if they were allowed the right of exemption it would disrupt the coal business, but if they were denied the right to be exempt, then, why, it would tend to make this law, this Bituminous Coal Act, universal in Arkansas and would then stabilize the business. This matter was called to my attention by one of the operators.

Mr. Machugh: Thank you, Mr. Denman.

Examiner Newcomb: Just a moment, please, Mr. Denman. Mr. Plein, the Commission's geologist, has requested the Examiner to permit him to ask a few technical questions of you.

The Witness: Very well.

By Mr. Plein:

Q. Mr. Denman, I have listened to your experience with great interest, particularly around Punxsutawney and Windber with which I am quite familiar. I would just like to ask you one or two simple questions here. One of them is on this calculation of the fuel ratio of these analyses. Can you explain how you arrived at any one of those figures? You take the analyses as given. How did you get the fuel ratio? I think the Examiner has some figures right there.

A. I can give it without referring to those, in a general [fol. 333] way.

Q. All right.

A. Most of these were taken on the proximate analyses. I simply divided the total percentage of the fixed carbon by the percentage of volatile matter, as recommended by Mr. Collier in his survey. Let me add this. I think in one instance I took the analyses on a dry basis; most of them

were taken from proximate analyses on a "as received" basis.

Q. For instance, I read this one here: Moisture 2.11, volatile combustible matter 11.42, fixed carbon 77.83, ash 8.64; you took the volatile matter 11.42 and divided it into this fixed carbon of 77.83?

A. I did, yes.

Q. In reference to the question raised by Mr. Gregory here that the railroads do not use any of this coal in locomotives, isn't that true of all low volatile coal, either in West Virginia or Pennsylvania, that the railroads prefer to use a high volatile coal because it has a long flame and it is better for getting up steam quickly in an engine?

A. I think that is generally true unless they have great difficulty in getting the proper coal.

Q. Around Windber, in your experience, that is a low volatile coal. I believe it is served by the B. & O. Rail-
[fol. 334] road.

A. No, it is served by a branch from the Pennsylvania Railroad.

Q. They might buy that coal as a courtesy to the mining company, to give them a little business, but they would prefer a high volatile coal for use in locomotive railroad engines? That is true of all low volatile coals and this coal in question in the Spadra field?

A. I think I answered. I think I said "yes."

Q. Now, your knowledge about this Hartshorne coal is quite thorough. As I understand, it extends from eastern Oklahoma on into western Arkansas. And in general it is double bedded. By that I mean it has a thin band of shale about at the middle and that sometimes this band becomes quite thick. Is that correct?

A. That is correct. That applies to the lower Hartshorne seam, which comes right above the Hartshorne sand seam.

Q. Is it your coal mining experience in all of the years that you have spent in the coal business that coal beds tend to vary over great distances of one hundred to one hundred fifty miles?

A. Yes. The same bed varies in character in much less distances than that. But in the instance that we are talking about, the Oklahoma-Arkansas field, the western part [fol. 335] of this bed is very—oh, it runs about forty-eight percent in fixed carbon, it runs about thirty-three to thirty-five percent in volatile matter. When you get to Bernice

it runs about ten percent of volatile matter and up to about eighty of the other. That is only in round figures.

Q. Yes.

A. But in that distance, in the same bed, there has been that much change.

Q. Take the Hartshorne seam in Sebastian County; is there any great difference between the top bench and the bottom bench in any one locality that might be sampled, as to its rank?

A. We operated in Sebastian County for a number of years where the vein was about eight feet thick and there were two separate beds, separated by about ten inches, and we had analyses where we took one sample from the upper bench and another sample from the lower bench and had them analyzed separately, and we never found very much difference except that on the upper bench there was often a hole that would run imperceptibly from coal into bone and it run a little higher in ash. And that was about the only difference between the two benches, the Hartshorne benches.

Q. Of course, if there was bone in any part of this bed, [fol. 336] that would tend to change its volatile and fixed carbon, if that was included in the analysis, wouldn't it?

A. In taking the samples we would try to keep the bone out, but where it goes imperceptibly from bone into coal, we would probably get a little bone in the sample, but the only difference we could distinguish, it would make the ash a little higher.

Q. When you go east in Arkansas, is there any place that you know of where there is a difference in the character of top and bottom bench of the Hartshorne seam?

A. I don't know of any place, in my own experience. There is a difference, always some difference in mining but I don't know what difference in chemical analyses. Sometimes the bottom bench will have bone and sometimes the top bench will have bone, but outside of that my experience—I don't know whether there is much difference in the chemical analyses if you exclude the bone or sulphur compound. Sometimes there are sulphur compounds.

Q. Now, they would be excluded from a representative face sample?

A. Yes, sir.

Q. Is there any difference in the physical character of the top and bottom bench? By that I mean—

A. (Interrupting) I was just trying to think over the [fol. 337] different places. Yes, I know of samples where there is considerable difference in the hardness of the two benches of the coal.

Q. When this coal is mined and loaded into the mine cars, taken out and screened, if there is a difference in the hardness of the top and bottom benches, the bench which is hardness would tend to make the largest sizes, lump or egg or stove, whereas the bench which is softer and more friable would tend to go into the nut and slack sizes?

A. Yes, sir. I wish to correct the statement that I made there. I do know a few places where there is a difference in the quality between the top bench and the bottom bench where they are being worked from the same mine. There is a mine down at Denning that has a coal they are asking for a different classification, one bench from the other, and the intention is to mine from one bench in the daytime and the other bench at night. One is worked on the long wall basis, one bench, and the rest of the mine on a room and pillar basis, the room and pillar system of mining. And I know of a mine out in eastern Oklahoma, they call the upper Hartshorne, where the lower bench of coal is smaller, only about eight inches thick, is very soft and the upper bench is reasonably hard coal.

Q. In your experience in the mines around Punxsutawney, Pennsylvania, which is a low volatile bituminous coal— [fol. 338] A. (Interrupting) As I remember it, it is a good many years since I worked up in the Punxsutawney field, but it was a bituminous coal and I think that the fixed carbon was about fifty or sixty; it was not like the Windber coal. The Windber coal was high in fixed carbon. It is a low volatile coal.

Q. At Windber, that is the Miller seam?

A. Yes, sir.

Q. Do you remember there whether there was any difference in the physical character of any part of the bed; was some part of it harder than others? Perhaps that is an unfair question since it has been so long ago.

A. No. I remember that. I was back there in 1914, during the time the war started, as assistant general manager, and I remember pretty well. There was a part of the seam we used to throw out because it had impurities. It was a very pure coal as analyzed except sometimes we would run into patches where we would have to throw out a foot

or eighteen inches of the vein, but I do not think there was much difference in the hardness of the coal. Most of it went for steamship use; it was shipped to the dock at Philadelphia and New Jersey piers, and the steamships would turn it down. They were very critical; it was turned down on the company.

Mr. Plein: That is all. Thank you, Mr. Denman.
[fol. 339] Examiner Newcomb: Any further questions of Mr. Denman? Thank you, Mr. Denman.

(Witness excused.)

S. A. BRAMLETTE, Assistant Secretary of the Bituminous Coal Producers Board of District 14, Fort Smith, Arkansas, was duly sworn and testified as follows:

Direct examination.

By Mr. Riddle:

Q. State your name.

A. S. A. Bramlette.

Q. Where do you reside?

A. Fort Smith, Arkansas.

Q. How old are you?

A. Sixty-two.

Q. What business are you engaged in?

A. I am employed as assistant secretary of the Bituminous Coal Producers Board of District 14 under the Bituminous Coal Act.

Q. What has been your business heretofore; state your experience in the coal business?

A. It has been somewhat varied, more or less connected with the coal industry for some forty years.

Q. Give your experience in the coal industry briefly, if you can? Forty years is a long time.

[fol. 340] A. I worked in the mines as a boy. I worked some twenty years in the various mines of Missouri, Kansas, Arkansas, Oklahoma, and Illinois. Later, after some absence from connection with mining, I was engaged as a commissioner by the coal operators of the Southwestern Interstate Association, which was composed of coal pro-

ducers in the states of Missouri, Kansas, Arkansas, Oklahoma, and Texas, as commissioner, the duties of which were to handle disputes arising under the joint wage agreements, negotiating the agreements with the miners. Later engaged in the operation of a mine as an operator; later employed by a producing company in the sales department.

Q. How long were you sales agent?

A. I was employed by one concern some six years in the sales department.

Q. The total number of years that you worked as a sales agent is how many?

A. About six years in the sales department and some four years later in the land department.

Q. Are you acquainted with the various seams of bituminous coal throughout the United States?

A. Not generally but to some extent west of the Mississippi river.

Q. You are acquainted with those west of the Mississippi river?

[fol. 341] A. I think fairly well, yes, sir.

Q. Did you examine these exhibits from 1 to 7 that were offered in evidence?

A. I have observed them.

Q. And examined them? What class of coals are those?

A. It is very difficult for me, I think, or any other man, to distinguish between two or three samples of coal; but observing the several samples that I have seen presented here, there has only, in my opinion, two ranks of coal been offered as exhibits—bituminous coal and anthracite coal.

Q. Where did the anthracite coal exhibit come from; was that found in this state?

A. No, sir, no such coal produced west of the Mississippi River except something almost comparable with that is produced in the state of New Mexico and in the state of Colorado, but nothing as between Colorado and New Mexico and the Mississippi River that is comparable with that small sample of anthracite coal.

Q. Now, a price list has been referred to here by counsel for the petitioner. As a member of District Board 14, tell the Examiner whether or not there has been any price list promulgated by this District Board.

A. As the assistant secretary to the executive in charge of the office, there is no approved price list for District [fol. 342] 14.

Q. And the price list that has been read from here by counsel was not the price list fixed by this Board, and there has been no—

A. (Interrupting.) Not the price list fixed by this Board as the prices in effect. The price list, as I viewed it or heard it read here, is merely a proposal submitted under Order No. 42 of the National Bituminous Coal Commission on proposed prices, subject to approval, modification or disapproval of the Commission, and is not published and cannot be published or made effect until it has been acted upon by the Coal Commission.

Q. And the Coal Commission has not yet fixed the prices, isn't that correct?

A. That is right; no prices have been fixed.

Q. You are acquainted with all the seams of coal in Arkansas, aren't you?

A. Fairly well, yes.

Q. Is there any anthracite coal in this state?

A. Not that I know of, Judge.

Q. Or semi-anthracite coal?

A. As I understand the specifications that determine the ranks of coal, there is no semi-anthracite in Arkansas.

Q. Now, what markets, if any, do the coals of Arkansas come in competition with? I mean what coal, what other [fol. 343] coal in particular does the coal—

A. (Interrupting.) Arkansas coals and particularly those coals produced in District 14, which includes the entire state of Arkansas under the Bituminous Coal Act of 1933 and three counties in eastern Oklahoma, compete with coal in central Oklahoma, Kansas, Missouri, Iowa, a small portion of coal coming from Colorado and Wyoming into the territories of Omaha, and perhaps some in Lincoln, Nebraska, but more particularly the competition that affects the movement of Arkansas coals is that of the Pocahontas coal, the West Virginia coal.

Q. And that is a bituminous coal?

A. Yes.

Q. Semi—

A. (Interrupting.) It is a low volatile, high grade bituminous coal.

Q. With respect to the market prices, do you know whether they are about the same or which is the higher?

A. My observation and knowledge gained from acting as secretary of marketing organizations of this district, in

the absence of any regulation, has been that competition in the northwest territory, as we term it, and that includes Iowa, Minnesota, and a part of the Dakotas, has been with the Pocahontas coals. The prices, as I recall, have been in favor perhaps of the coals of Arkansas to the extent of [fol. 344] fifty cents in those common consuming marketing areas below Pocahontas coals until the season of 1937. I am advised by reputable representatives of sales agencies offering Arkansas coals in those same markets that there has been some reduction in Pocahontas coals and that perhaps puts Arkansas coals out of parity.

Q. Then these coals here, not only in the Spadra field but throughout the state, compete with the smokeless coals of West Virginia commonly known as Pocahontas coal?

A. That is correct.

Q. Now, in looks and structure and burning qualities does the coal from Spadra and Johnson and Pope Counties resemble anthracite or Pocahontas?

A. My observation of the burning of anthracite has been very limited, but my observation of the burning of the so-called Arkansas anthracite has been fairly good. I can recite no better instance than about 1922 or 1923. I was informed by the Operators Association of Arkansas, particularly in behalf of the producers of the Spadra coal, to put in an exhibit at the State Fair at Little Rock, Arkansas, to try and demonstrate and effect if we could some interest in Arkansas coals. A producer of the Spadra field who was at that time associated with the gentleman who testified here yesterday as a witness—Mr. Dowdy—[fol. 345] James Dowdy was my associate in that demonstration. He was associated at that time with Mr. McKinney in the operation of the Sunshine mine, upon which this case turns at this time, I think. We demonstrated through an exhibit there by the building of a flue, chimney, fireplace, putting a grate in it, circular heater, and we continued that exhibit throughout the entire period of the State Fair. I don't recall how many days, but quite a length of time. And I got considerable experience and observation in seeing the coal perform.

Q. Just describe it.

A. The coal is slow in igniting but lights with a flame, a yellowish flame, and continues a yellowish flame until the entire mass of coal becomes a red body. By regulating the draft you increase or diminish the heat, by the shaking

of the grates and the regulation of the draft, until that is very similar in its performance to coals in the Coal Hill district and in the Denning district and in the Paris district, which are adjacent to the Spadra all of which are smokeless in the common expression of the term.

Q. Explain, if you can, the geological formation of the Hartshorne seam of coal, its characteristics and variations, as to mining locations.

A. I think that the best authorities, those upon which I [fol. 346] have relied, and many years association with the coal industry in Arkansas and Oklahoma, comes from the same experience as that quoted by Mr. Denman, Bulletin No. 326, Department of Interior, United States Geological Survey, under director George Otis Smith; the Arkansas Coal Field by Arthur J. Collier with reports on the paleontology, by David Wood and G. H. Kirby.

By Mr. Machugh:

Q. Is there a date on that document?

A. Yes, sir.

Q. Would you mind stating it, please?

A. The publication came out in 1907. And I am advised on a recent visit to Washington, D. C. that the Bureau of Mines through Mr. Snider, regards this as the most authentic work there is on the geology of Arkansas coals, hence I refer to this because I think it is good authority. Mr. Collier in describing the Arkansas coal fields goes into it quite extensively, from which Mr. Denman quoted you freely on the analyses and so forth. For the benefit of those here I have had made a photostat copy of a part of the map of the Arkansas coal field by Collier. Our difficulty was that the photostat apparatus was not big enough to include the entire map, but it does include, I think, about fifteen miles of the western line, the entire remaining portion of the coal area, which includes that which is now before this [fol. 347] hearing. I should like to file that as an exhibit.

Mr. Riddle: Please mark this as "Commission's Exhibit No. 8."

Examiner Newcomb: So admitted.

(The photostat copy of map above referred to was marked for identification as "Commission's Exhibit 8," and was received in evidence.)

By Mr. Riddle:

Q. Now proceed and tell the Examiner anything further—

Mr. Machugh: Pardon me, but is that being marked for identification or being marked in evidence?

Examiner Newcomb: It has been admitted.

Mr. Riddle: No, I have not offered it yet.

By Mr. Riddle:

Q. Anything else you want to say in explanation of the exhibit which is marked "Commission's Exhibit 8"?

A. In further explanation of this proposed exhibit, Mr. Collier in the discussion of the Arkansas coal fields, in his survey made in 1906 and reported in 1907, proceeds to show the horizon by this map of the Hartshorne coals, very carefully and outstandingly portrayed throughout the entire area, the Hartshorne horizon and the coals above the Hartshorne sandstone, and extends to not only the western line of the state of Arkansas but into Oklahoma, to some [fol. 348] slight extent as far west as McAlester, Oklahoma, to and including the mines in Pope County, Arkansas. And particularly outstanding is the so-called Spadra field, which crops to the north of the Arkansas River, north of the town of Spadra, dips under the Arkansas River, crops again on the south side of the Arkansas River at Prairie View, described by every geologist that has ever investigated and reported on the field as being the Spadra coal, an extension and part of the Hartshorne coal, and described definitely on various reports as Har-shorne coal.

Q. What are the distinctive physical characteristics of this Hartshorne seam, or why is it called the Hartshorne seam?

A. It is geologically determined by its stratification; the Hartshorne sandstone is the base from which all of it is described; it underlies all of this coal.

Q. And the Hartshorne sandstone underlies all of the coal including the Spadra coal and all the rest of the fields in the state of Arkansas?

A. Correct.

Mr. Riddle: We offer in evidence now "Commission's Exhibit 8."

Examiner Newcomb: So admitted.

("Commission's Exhibit 8" has heretofore been admitted in evidence.)

[fol. 349] By Mr. Riddle:

Q. Do you have any further statement to make regarding the classification of this coal? Please give the Examiner any statement you have to make.

A. The classification of the coals is described by the authorities largely dependent upon the rank of the coal. Rank is determined by its analyses. ~~As I recall, and I cannot quote the bulletin number but it is a recent publication, however, I think one in 1935 and later in 1936, describes the groups of coal. In No. 1 group or class—perhaps I had better say—is defined three kinds of anthracite coal: Meta-anthracite, anthracite and semi-anthracite. The next rank of coal is bituminous coal. Much has been said here about semibituminous coal, and it is mentioned in the Coal Act as semibituminous coal, but I cannot compose that with high rank low volatile bituminous coal. I don't know what it means.~~

Q. Wouldn't the better word be "super-bituminous"?

A. I think much better.

Q. And hasn't that been suggested by several geologists?

A. Yes, sir, that is true.

Q. And writers?

A. Yes, sir, that is correct.

Q. And that really, as between terms, should be the [fol. 350] term rather than the term semibituminous, in your judgment, is that correct?

A. Yes. There are three ranks of anthracite coal, meta-anthracite, anthracite, and semi-anthracite. I must conclude, if I stop at that, that semi-anthracite is of a lower rank than anthracite.

Q. Yes, but that is not true according to experience; is it?

A. Yes.

Q. In heat units?

A. No, sir, not from that standpoint, no. But when we get into the next rank the Act speaks of semibituminous, bituminous, and subbituminous. One is super and the other is lower.

Q. The same thing is true of the semibituminous; that term "semibituminous" shows the highest heat units of any other coal, doesn't it?

A. That is the conclusion we must arrive at.

Q. Hasn't that been the experience, that it has, and most of the authorities agree, including Campbell?

A. Yes, sir, Campbell has said that.

Q. That semibituminous coal is the highest in heat units of any coal found in the United States?

A. Correct.

Q. If you have anything further, please proceed.

[fol. 351] A. Mr. Examiner, I do not want to prolong my statement because, as I stated, I have another meeting waiting on me, a very important meeting. If permitted I want to quote from information taken from Collier's report, analyses of coal samples from Arkansas, as shown in Bulletin 326, Department of Interior, United States Geological Survey, entitled "The Arkansas Coal Fields," by Arthur J. Collier, 1907. Samples 15 and 16 on Russellville-Bernice; samples 17 and 22 on Spadra coal, and sample 18 on Clarksville coal.

"Sample No. 15, laboratory No. 3177, represents a mine in the Shinn Basin, south of Russellville, and was collected by C. D. Smith from a working face in the deepest part of the mine. The coal is reached by a shaft seventy feet deep, located in section 22, township 7 north, range 20 west. It varies in thickness from thirty to thirty-six inches. The bed is in the Hartshorne horizon and may be identical with that mined in the western part of the field at Huntington, Jenny Lind, and Greenwood.

"Sample No. 16, laboratory No. 3176, from a mine in Shinn Basin, south of Russellville, represents the same bed as sample No. 15. This is the deepest mine in Arkansas, the coal being reached by a four hundred eighty foot shaft. It is situated in section 21, township 7 north, range 20 west. [fol. 352] The sample was collected by C. D. Smith from one of the working faces of the mine.

"Sample No. 17, laboratory No. 3368, from a mine near Spadra, Arkansas, in the southwest quarter, section 14, township 9 north, range 24 west. The bed is forty-four inches thick, with a parting of three inches or more near the middle. It is mined from a shaft one hundred and forty feet deep. The sample was cut by R. D. Mesler from one of the working faces of the mine.

"Sample No. 18, laboratory No. 3369, is from the Brooks mine, about two miles south of Clarksville, in section 17, township 9 north, range 23 west. The coal bed is known as the Spadra bed and has a thickness of thirty-four inches with a two-inch shale parting near the center. It is mined

from a shaft two hundred and forty feet deep. The sample was taken by R. D. Mesler from one of the working faces of the mine.

"Sample No. 22, laboratory No. 3407, represents the coal from a mine in section 23, township 9 north, range 24 west, near Spadra. The coal is mined from a shaft one hundred feet deep, and is known locally as the Spadra bed. It is in the Hartshorne horizon and is equivalent to the coal mined at Jenny Lind and Huntington, Arkansas, and at Hartshorne, Indian Territory. The sample was taken by R. D. Mesler, from one of the working faces, where the coal is three feet five inches thick with a two-inch shale part-[fol. 353] ing near the center.

Mr. Gregory: Mr. Examiner, may I ask him the name of all those samples?

A. Quoting also Collier's report, "Arkansas Coal Field," 1907.

By Mr. Gregory:

Q. Are any of those mines in existence or have they been—

A. I beg your pardon?

Q. Are any of those mines in existence or have they been for the past ten or fifteen or twenty years?

A. I think so. I think the mine near Russellville, that these analyses are reported from, is still in existence.

Q. Is this Brooks mine you mentioned still in existence?

A. I don't think so.

Q. You don't know whether it is or not?

A. I don't know. However, I am quoting analyses on Spadra coal.

Q. In 1906—thirty-one years ago.

A. The Hartshorne horizon. I quote further, Mr. Examiner, or rather here is a table of analyses in support of the preliminary statement. Spadra, U. S. Geological Survey No. 17, laboratory No. 3368. Analysis of sample as received: Proximate. Moisture 2.11; volatile matter [fol. 354] 11.42, fixed carbon 77.83, ash 8.64. Ultimate. Sulphur 1.99. Calorific value determined: Calories, 7,619; British thermal units 13,714.

If acceptable, I will file this attached to the statement, explaining those without reading. If necessary, I will read them all, but it is quite an extensive table.

Mr. Gregory: Go ahead and file it, so far as we are concerned, to save a little time.

Mr. Riddle: Mark that as "Commission's Exhibit No. 9," then. I ask it be admitted in evidence.

Examiner Newcomb: So admitted.

(Analyses of coal samples from Arkansas, previously referred to, was marked "Bramlette Exhibit 9," and was received in evidence.)

The Witness: Quoting from pages 87 and 88 of the report referring to analyses made by the Arkansas Geological Survey, as commented upon is as follows: Samples of coal from twenty-seven localities were collected by the Geological Survey of Arkansas and proximate analyses, including specific gravity determinations made by the chemists of the Survey were published in their report. No uniform method was followed in collecting these samples, some being taken from the working face of mines while others were from earload or from piles of coal left on the dump. Therefore, a strict representation of the coals are not considered. [fol. 355] Moreover, the methods of analyses are not stated in the reports, but the Arkansas Geological Survey submitted it to Mr. Collier and he saw fit to use it in his report as the United States Geologist. This table of the Arkansas Geological Survey, in which there are twenty-seven samples, designating the location of each mine, the nearest town thereto, the township, range and section, moisture, volatile, fixed carbon, ash, sulphur, and fuel ratios.

By Examiner Newcomb:

Q. Do you have the dates, Mr. Bramlette?

A. It is quoted from the same report, Collier's Report, 1907, and a part of that report.

Mr. Riddle: You may mark this as "Commission's Exhibit 10".

Mr. Gregory: Mr. Examiner, we said that we were willing to have the whole report filed, or any part of it, with the comment that we have no objection to any of these old analyses being identified. They are thirty years old. They can all be filed; we have no objection, to just save the time of going through and reading these.

Examiner Newcomb: I understand Mr. Bramlette cannot file the book. It is a discontinued copy or volume.

The Witness: That is correct. That is right. But I may file excerpts which may be subject to comparison with that from which it is quoted in the book.

[fol. 356] Mr. Gregory: We have no evidence that they are exact copies, but we do not care. You can file anything you want to.

Mr. Riddle: I now offer Commission's Exhibit 10 in evidence:

Examiner Newcomb: So admitted.

(Tabulation of samples taken in proximate analysis of Arkansas coals made by the Geological Survey of Arkansas, previously referred to, was marked for identification as "Bramlette's Exhibit 10," and was received in evidence.)

Mr. Waldron: Mr. Examiner, may I ask a question?

Examiner Newcomb: Go ahead.

By Mr. Waldron:

Q. I will show you Petitioner's Exhibit M, a letter from the State of Arkansas, Arkansas Geological Survey, signed by George C. Branner, State Geologist, and ask you if you will call those four numbers off identifying the analyses as set forth in Petitioner's Exhibit M.

A. United States Bureau of Mines, technical paper 416. Sample No. 2587. Percent of dry mineral matter free fixed carbon is 88.47; percent mineral free volatile matter is 11.53.

Q. I will ask you now to refer to Department of Interior, Bureau of Mines analyses of coal in the United States, [fol. 357] Bulletin No. 22, page 382, and tell me if these are the same identical analyses as set forth in Petitioner's Exhibit M, which you have just read?

A. All right.

Q. 2587?

A. Yes, sir.

Q. 2588?

A. Yes, sir.

Q. 3368?

A. Correct.

Q. 3407?

A. Correct.

Q. I will ask you now to read from page 382 of this book, stating when those analyses were made by whom they were made.

A. I beg your pardon, Mr. Waldron, but we will have to go back to the preceding page.

Q. Go ahead and read it. Read right up at the top of the page there.

A. (Reading.) "The bed was sampled by W. J. Van-Voorhees and J. W. Graves, on November 27, 1904, at two points which showed the following sections. Section of coal bed in Consolidated Anthracite No. 1 mine of Spadra. Section A, Section B."

Q. That will be enough; I just wanted to get the date [fol. 358] in the record. Now, will you read as to analyses in Petitioner's Exhibit M as to No. 3368?

A. (Reading.) "This bed was measured and sampled by C. D. Smith in 1906, as shown below."

Q. Now, if you will read as to analyses 3407.

A. (Reading.) "Sample was taken by R. D. Mesler from one of the working faces where the coal is three feet five inches thick with a two-inch shale parting near the middle."

Q. And this one right here.

A. (Reading.) "Sample— coal beds— Spadra, on the Hartshorne horizon. An equivalent to the coal mined at Jenny Lind and Huntington, Arkansas, and Hartford, Oklahoma."

Mr. Waldon: That is all.

Mr. Patterson. Mr. Examiner, at this time, in order to shorten the record, we do not want to interrupt the witness, but we do not know just what record Mr. Waldron is reading from, and I would like to ask him if he can at this time locate the other nine samples on Petitioner's Exhibit M, and if he can do that and report later to us, if he will.

Mr. Waldron: You submitted that yourself under U. S. Geological Survey Bulletin 847-E.

Mr. Patterson: That is true, but it was from a letter and [fol. 359] I thought possibly you had that letter there.

Mr. Waldron: Your analysis is submitted and was taken or copied from U. S. Geological Survey Bulletin 847-E. That is where they came from.

Mr. Patterson: There is nothing in the record as to the time these samples were taken.

Mr. Waldron: No, sir. These were taken some years later.

By Mr. Riddle:

Q. Do the coals from the Spadra field or any other field in Arkansas compete with the anthracite coals in Pennsylvania?

A. Not to my knowledge.

Q. The only competition that you have is with the bituminous coals and principally with the Pocahontas in West Virginia, is that correct?

A. That is the only eastern coal, other than the competition formerly stated.

Q. The competition here?

A. Yes, sir.

Mr. Riddle: You may ask him.

Mr. Gregory: Mr. Examiner, I would like to ask first, with all this wealth of evidence we have here, in view of these expressions of opinion, if there is anything here to [fol. 360] indicate that the Pocahontas coal mentioned so often here is a bituminous coal. Do you have any Government booklets showing that it is a bituminous coal? It has been referred to several times as a bituminous coal. I wonder if there is any evidence of that?

Examiner Newcomb: Mr. Riddle, or Mr. Waldron, can you enlighten Mr. Gregory?

Mr. Riddle: Pocahontas districts are not included or excluded in the Act, and it has been my understanding all the time that it was semibituminous coal and of the highest heat producing coal in the country.

Mr. Gregory: Do you have anything indicating that? It is not important.

Examiner Newcomb: I am sure that Judge Riddle and Mr. Waldron will enlighten you, if possible, or show you from what they are reading.

Mr. Gregory: All right.

Examiner Newcomb: Any further questions?

Cross-examination.

By Mr. Gregory:

Q. Mr. Bramlette, is it not a fact that you during this period of time that you were engaged in selling coal—

A. I beg your pardon?

Q. During this period of six years that you mentioned you were engaged in selling coal, were you in the employ [fol. 361] of the Pittsburgh & Midway Coal Company?

A. Yes, sir.

Q. Didn't you sell some Sunshine anthracite coal during that period?

A. I did.

Q. Did you sell it as anthracite coal?

A. I sold it as Arkansas anthracite, as a trade name, for the Spadra Coal Company.

Q. Did you ever sell any bituminous coal out of the Spadra field in your experience?

A. Yes.

Q. Did you sell it as bituminous coal?

A. No. I sold the Spadra anthracite coal to the trade.

Q. Did you ever sell any steam coal while you were in the employ of the Pittsburgh & Midway Coal Company?

A. Some, yes.

Q. Did you sell any steam coal or coal for the production of steam from the Spadra field?

A. Not that I recall.

Q. Do you know of anybody else that ever sold it for steam coal?

A. I am not familiar with other people's concerns.

Q. Did you sell any crushed coal from Arkansas mines for steam coal?

[fol. 362] A. Yes, sir.

Q. You sold coal from any of the Arkansas fields such as Paris, Denning, Jenny Lind, or others, for steam purposes?

A. I sold coal from the Paris field, the Altus field, which is adjacent to the Denning field, the Charleston field, Hartford Fallow, eastern Oklahoma, the Poteau field—for both domestic steam purposes.

Q. But you never sold any steam coal from the Spadra field?

A. Not that I remember.

Q. Did you ever sell any coal to the smelters personally?

A. I beg your pardon?

Q. Did you ever sell any coal to the smelters during that period of time?

A. Yes, sir.

Q. What kind of coal did you sell them?

A. I have sold Spadra coal and I have sold Arkansas pea coal to smelters in Arkansas.

Q. You did not sell any of these other coals we have just mentioned to the smelters for fluxing?

A. I have sold it and coal produced down here.

Q. Not normally or naturally?

A. How is that?

[fol. 363] Q. Not normally or naturally, from any of these other districts?

A. Serving the same purposes and requirements that the Spadra coals were used for—fluxing.

Mr. Gregory: I think that is all.

By Mr. Patterson:

Q. You heard Mr. Denman's testimony, didn't you?

A. Yes.

Q. You heard him testify that in his opinion the Spadra coal was a semibituminous coal?

A. How is that?

Q. You heard Mr. Denman testify that in his opinion the Spadra coal was a semibituminous coal?

A. I think he did.

Q. Do you agree with his testimony?

A. I fully concur in Mr. Denman's statement in connection with the rank of the coal.

Q. In all respects?

A. In all respects.

Q. Did you hear him say it was a little better coal than bituminous coal?

A. No, I did not.

Q. Did you hear him say it was a little better grade coal than bituminous coal?

A. Perhaps we had better have the record read on that [fol. 364] because I am not taking statements from the attorneys. I want the record on it.

Mr. Patterson: He will read it, I am sure.

Examiner Newcomb: The reporter will read it back.

Mr. Patterson: At the beginning of Mr. Denman's testimony.

Examiner Newcomb: Mr. Denman's statement or answer.

Mr. Riddle: That statement was made by Mr. Denman at the conclusion of his remarks.

Mr. Waldron: But he also stated earlier in his testimony that it was still, notwithstanding, a bituminous coal.

The Witness: I think that is correct.

Mr. Patterson: All right, I will withdraw it. That is all.

Examiner Newcomb: Consumers' Counsel have any questions?

By Mr. Machugh:

Q. Mr. Bramlette, may I ask you what, in your opinion, will be the effect of granting an exemption to the Sunshine Coal Company in this proceedings?

A. You want my honest opinion on that?

Q. I certainly do.

A. Demoralization of the coal industry in District No. 14 will be the effect of it. That is a pretty broad statement.

Q. Why?

[Fol. 365] A. Because of the fact that the competitive conditions that the coals are produced in District 14, as previously stated by previous witnesses, as well as in my statement, with the Pocahontas coal of West Virginia. If this exemption is permitted, if experience and information has any bearing on the situation, we can look forward to prices having already been proposed by the petitioner in this case, to reduce the prices of coal in the markets that a great amount of our coal goes to. That will make it impossible for competitors to operate their properties.

Q. And what will be the effect upon the consumer?

A. This effect. After the competitor is out of the picture, if you please, they then have formed a monopoly on the production of this particular smokeless coal in Arkansas and can put the price wherever they please. But that is not all. Regardless of the price that this coal may be sold to the jobber and through the jobber to the retailer, the consumer will get no benefit out of it of any reduced prices. He will pay just as much for his coal if it is sold to the jobber for four dollars a ton f. o. b. mines as if it is sold at five dollars f. o. b. mines. In other words, the middle man takes the benefit that might accrue to the consumer.

Q. Will the effect upon the consumer be beneficial or harmful or immaterial?

[fol. 366] A. I think finally it will be very detrimental to the consumer if this exemption is allowed.

Q. Have you anything further to say in respect to the effect upon the consumer?

A. Those are my conclusions in the matter.

Mr. Machugh: Thank you, Mr. Bramlette.

Examiner Newcomb: Any further questions of Mr. Bramlette? Thank you, Mr. Bramlette.

(Witness excused.)

Examiner Newcomb: We will adjourn until 9:30 tomorrow morning.

(Whereupon, at 4:30 o'clock p. m., October 5, 1937, an adjournment was taken until 9:30 o'clock a. m., October 6, 1937.)

[fol. 367] BEFORE THE NATIONAL BITUMINOUS COAL
COMMISSION

[Title omitted]

Goldman Hotel, Fort Smith, Ark.,
October 6, 1937.

Met pursuant to adjournment at 10 o'clock a.m.

Before: Carman A. Newcomb, Examiner.

APPEARANCES:

John A. Riddle and Robert F. Waldron, Attorneys for
National Bituminous Coal Commission.

Max Milligan, Attorney for Marketing Division.

Joseph V. Machugh, Attorney, Office of Consumers'
Counsel.

J. G. Puterbaugh, H. Denman, and S. A. Bramlette,
Members, District Board No. 14.

G. O. Patterson, Jr., and W. G. Gregory, Appearing for
Petitioner, Sunshine Anthracite Coal Company.

[fol. 368] Proceedings

Examiner Newcomb: Mr. Riddle, you may proceed.

Mr. Riddle: We will use Mr. Plein next.

Examiner Newcomb: Be sworn, Mr. Plein.

L. N. PLEIN, Washington, D. C., was duly sworn and
testified as follows:

Direct examination.

By Mr. Riddle:

Q. State your name to the Examiner.

A. L. N. Plein.

Q. Where do you reside?

A. Washington, D. C.; business address, National Bituminous Coal Commission.

Q. What is your business or profession?

A. I graduated from Columbia College with the degree of Bachelor of Arts and Engineer of Mines in 1921, from Columbia University in New York. After graduation, I worked principally for the Moffat Coal Company, in Routt County, Colorado. My work with that company was principally engineering work, in the operation of mines; a part of the time was in development and prospecting for so-called anthracite in Routt County. After I left them I went with the Bureau of Mines in 1925. For about two or three years—for three years I was employed in the fuel inspection section of the Bureau of Mines, collecting and inspecting coal in Pennsylvania, Maryland, West Virginia, Virginia, Kentucky, and Alabama.

Q. Were those collections for the purpose of analyses?

A. Yes.

Q. You took the samples yourself?

A. Yes, sir, both in the mine and on the tippie.

Q. While you are at that point, I beg your pardon for the interruption.

A. Yes, sir.

Q. I wish you would tell the Examiner just how it is done and what is proper to get a proper sample for analysis.

A. Well, there are two kinds of samples that you take. Well, there are more than two, but the two principal kinds. You go in the mine and collect samples at the working face. To do that properly it is necessary to sample a mine according to its size. The bigger the mine the more samples you have to take. You have to take at least three, possibly more if it is a large mine. Then at each working face that you decide to take a sample, that is up to the engineer who is collecting the samples and not to the company that is operating the mine, you prepare the face by cleaning it off with a pick from top to bottom. You remove any impurities such as bug dust or powder or slate or rock dust that may have adhered to the face. You should at least clean off a space three feet wide and the full height of the coal. Then you start at the bottom with a pick and dig a channel at least three or four inches wide and two or three inches deep, and as you pick this coal you have a clean piece of canvas laying at the base of the section, on to which these pieces of coal fall. After collecting this

sample at that uniform depth of two inches and width of three inches you crush the coal that you have collected so that it will go through a half inch square opening. Then you quarter it. I do not think it is necessary to explain that.

Q. No.

A. And put it in a container which is immediately sealed air-tight. It might be a Mason jar or a can that is provided by most laboratories, particularly the Bureau of Mines, with a rubber seal so it does not lose any of its moisture or change in its shipment to the laboratory.

Q. I want you to proceed with your personal history, what you have done. At that point I asked you to state how this sample was taken. I will ask you about the laboratory tests later.

A. You asked me about the tipple samples also, which I have not explained. Shall I explain that now?

[fol. 371] Q. Yes.

A. A tipple sample should be collected from the loading boom or from the mine car as the coal is being loaded after it is fully prepared for the market. That again is up to the sampler as to his judgment as to where this sample shall be collected. He must not take it out of the mined cars before it is put over screens or picked or mechanically cleaned. The best place generally to take it is off the loading boom as it falls into the car, providing there is no man in the car picking the coal. There again it is up to the judgment and experience of the sampler as to how he will do that, but he must collect at least a thousand pounds of coal over a representative day's run. Now, if a mine is loading three cars of egg-size he must spread his sample of one thousand pounds over that three cars as it is loaded. That means the sampler must be there when the mine starts running and he must be there when it finishes the run for that day. He should collect samples for every size of coal produced at the mine. After he has collected this thousand pounds of samples it is necessary to crush it down. This is all explained in Technical Paper 133 of the United States Bureau of Mines, as revised by N. H. Snider. In that paper it explains fully how this should be done. The only difference is that the Bureau of Mines generally uses riffle [fol. 372] buckets for quartering the coal, which is a quicker method and just as exacting. From there on, after he has quartered it down, he splits his sample and takes one which

he sends to his own laboratory, and the other to the operator; if the operator cares to have a check analysis run. He may split it into four parts or eight parts or sixteen parts even, the final sample for check analyses by different laboratories. Generally three check analyses in a questionable case should be sufficient to prove if there is any discrepancy between analyses.

Q. If you have anything further to say about your experience and professional connections, you may do so, Mr. Plein.

A. After this experience in sampling coal I was called into Washington for about a year to help prepare quite a few of these technical papers on the analysis of coal. I think the first one I worked on happened to be this No. 416 on analyses of Arkansas coals. The next one I believe was Indiana. Then they began to use my name in the books a little bit. I think Kansas, Maryland, Montana, and Washington were a few of the others, and Wyoming. Publications of classifications from these states. Then I was transferred to Pittsburgh, where I worked from 1928 for about five years on mining methods and development of coal mines, still in the Bureau of Mines. During that time I [fol. 373] had further occasion to visit mines in Kentucky and Ohio, both for inspection of coal and inspection of mining methods. In 1934, while I was at Pittsburgh, I wrote several papers on mining methods in eastern Ohio and western Pennsylvania, and then for the entire Pittsburgh coal bed. Then in 1934 I went with Mr. Tryon, who was then chief economist of the coal economists division of the Bureau of Mines. I have been with him ever since in the economical studies of the coal industry. On July 1st, we were all transferred to the Coal Commission. Now, these economical studies which I have been working on with Mr. Tryon, perhaps the names are misnomers because almost all the work that I have been doing for him, while it involves the supervision of the preparation of certain kinds of statistics, it really involves quite a bit of technical knowledge to see that these things were all coming in correctly from the mine operators. The Bureau of Mines, of course, has no authority to demand any information from any coal operator, as distinguished from the Coal Commission, which does have that authority. Since July 1st of this year with the Coal Commission I have had many and various kinds of problems and worries which have arisen.

Q. Are you acquainted with the history of the classification of coals?

A. In a general way.

[fol. 374] Q. If you are, state briefly what the history is of those classifications.

A. Ever since man became interested in coal, even say since 1800, there have been attempts to classify it in some way or other. There have been many ideas. At this time I would like to introduce a reference in the transactions of the American Institute of Mining Engineers, in which is listed many of the ideas that have been given for the classification of coal.

Q. You may do so, by permission of the Examiner.

(A discussion was had off the record.)

A. The reason I want to put this in the record, it would be there for the Examiner's use, if Mr. Patterson does not object. There are so many ideas of this classification of coal that it is almost impossible for anyone to have them all in mind, but here is a clear statement in a publication of a national mining society by a recognized geologist from Princeton University.

Examiner Newcomb: Give the title, the date, and the page to which you refer, please.

A. It is from the "Transactions of the American Institute of Mining and Metallurgical Engineers," Volume 101, published in New York City.

By Mr. Machugh:

Q. What is the date?

[fol. 375] A. 1932. Volume 101.

By Examiner Newcomb:

Q. Who is the author?

A. The title of the article is "Status of Scientific Classification of American Coals," by W. T. Thom, Jr., Princeton, New Jersey. Mr. Thom is assistant professor of geology, Princeton University.

By Mr. Machugh:

Q. What is the page number?

A. Pages 201 to 203, inclusive.

By Mr. Patterson:

Q. Would you mind stating what company publishes that book, Mr. Plein?

A. It is the American Institute of Mining Engineers, a national non-profit organization; I am a member of that and I suppose Mr. Denman is or has been.

Mr. Denman: I have been.

By Mr. Patterson:

Q. Is it published by some book company?

A. I tried to get a reprint of this but I was unable to do it, and this is my own personal copy, this book. If you want a copy I might put their address in the record at this time. It is 29 West 39th Street, New York City. It is a national non-profit organization composed of engineers, chemists and geologists interested in various phases of the mining [fol. 376] industry. This paper lists the various methods—

By Mr. Riddle:

Q. I thought you referred to pages there that had to do with the classification of coals?

A. The history of the classification.

Q. The history of the classification?

A. The methods that have been used, yes.

Mr. Riddle: At this time, we desire to offer those pages in evidence, and ask that the witness read the same into the record if he desires to keep the book.

A. (Reading.)

"Characteristics and Purposes of a Scientific Classification.

"Regarding the elements necessarily involved in working out a scientific scheme of classification, Stansfield and Sutherland, quoting Grout, make the following statement:

"All bases for a scientific classification should be capable of quantitative determination, or be exactly related to some property capable of such a test, so that, if no natural groups are found, arbitrary lines may be drawn to limit the classes.

"The best basis for classification should involve inherent and fundamental qualities of the materials considered. Al- [fol. 377] lied to this is the requirement that advantage

should be taken of any natural grouping. As a further help in selection, the bases or tests should be easily applied, widely known, and have a wide range of values in the material classified.

"In order that we may apply the philosophy thus expressed, it is necessary for us to have clearly in mind both the reasons why coals differ and the specific purposes to be served by the classification to be devised.

"Coals differ because, as modern science has shown, coal beds are actually neither more nor less than buried and altered peat deposits, formed in remote geologic time. And as is generally known, such peat beds consisted of masses of partly macerated and decayed trees, shrubs, plants, mosses and/or algae, deposited under swamp or semiswamp conditions. It is therefore to be expected that coals will vary:

"1. Because of differences in the parent vegetation, due either to evolutionary plant changes, as from the fern-like types of the Paleozoic to the coniferous and hardwood types of the late Mesozoic and Tertiary; or due to the differences in floral assemblages (growing at the same time) induced by differences in local environmental conditions. For example, moss, sedge, woody and other peats are today accumulating simultaneously in different bogs in North America.

[fol. 378] "2 Because of differences in the stage to which bacterial decay proceeded in the peat bed. Peats laid down in stagnant waters suffer little additional decay after immersion, whereas peats formed in open water, or in well drained swamps are subjected to prolonged bacterial action, which will destroy all except a few of the minor and more decay-resistant plant substances such as resins, waxes, seed coatings, bark, etc.

"3. Because of differences in the intensity of the pressure and heat which have affected the peat beds after burial, and because of differences in the length of time that the various coals have been subjected to such compression and heating.

"Owing to the interplay of the above-mentioned factors, coals may exist in an almost endless variety of forms.

"Moreover, as different coals have different use proper, ties the classification of coals becomes a matter of practical importance as well as of great scientific interest. As we

all know, many important modern industries are dependent upon the ready availability of coals possessing certain physical or chemical properties, and consequently the industrial world needs terms by which business men can specify the particular kind or kinds of coal they wish to purchase, and scientific men can describe coals needed for new processes and uses in terms of a scientifically exact and [fol. 379] generally understood classification system.

“Early History of Coal Classifications

“The developing need for a coal classification was first indicated by the employing prior to the 1800 of such terms as bitumen lapideum, cannel coal, Braunkohle, Lignite, Anthracite, etc., and by the subsequent adoption of the terms semibituminous, semi-anthracite, and subbituminous coal. Karsten, Regnault, Richardson, Stein, Fleck, and Schondorff, were other pioneers who proposed schemes for classifying foreign coals, and Johnson, Rogers, and Frazer, were among the first to attempt to use chemical analyses as bases for a systematic classification of American coals, and Gruner, Seyler, Campbell, Grout, Parr, Bauer, Dowling, White, Ralston, Ashley, and others have offered further proposals regarding systems for classifying coals.

“Suggestions Regarding Basis to be Used for Scientific Coal Classifications.

“Mention was made in the previous paragraph of a number of the early coal classification systems put forward by different authors and comprehensive surveys of recent work along this line are contained in Fieldner's paper presented before the Second International Conference on Bituminous Coal in 1928; in Stansfield and Sutherland's paper (1929) on the classification of Canadian coals; in A. I. M. E. [fol. 380] symposia of 1928 and 1930, and more recently by Bode and Grummell. Bases used in some of these classifications were as follows:

“Regnault's Classification used proportions of chemical constituents shown in ultimate analyses.

“Johnson's Classification applied to high-rank coals. It employed fuel ration $\frac{(- \text{Fixed Carbon})}{(- \text{Volatile matter})}$ shown by proximate analyses of 'dry ash-free' coals.

“Rogers Classification divided high-rank coals on percentage of volatile matter.

“Frazier’s Classification applied to high-rank coals. Used ‘fuel ratio’ devised by Johnson.

“Seyler’s Classification was based on ratio of carbon to hydrogen in ultimate analyses of dry, ash-free coals.

“Campbell’s (early) Classification used carbon-hydrogen ratio of air-dried, ash-free coal.

“Grout’s Classification was based on proximate analyses of dry, ash-free coals. Used fixed carbon alone for anthracite coals, and fixed carbon and total carbon for lower ranks coals.

“Dowling’s Classification employed the ratio

Fixed carbon + $\frac{1}{2}$ Volatile combustible

Moisture + $\frac{1}{2}$ Volatile combustible

“International Geological Congress Classification employed the ratio $\frac{\text{Fixed Carbon}}{\text{Volatile matter}}$ flame characteristics and calorific value.

[fol. 381] “Ralston’s Classification plotted carbon, hydrogen and oxygen percentages from ultimate analyses on a three-coordinate system.

“Campbell’s (later) Classification employed physical criteria and ratios of fixed carbon, volatile matter, and calorific values shown by proximate analyses of ash-free coals.

“Parr’s Classification employed volatile matter and calorific value of proximate analyses for dry, ash-free coal, in terms of ‘unit coal’ as calculated by formula correcting for sulfur, etc.

“Ashley’s (use) Classification was based on proximate analyses and physical factors, assigning also ash and sulfur limits determining ‘grade’ of coal.

“White’s Classification classified according to position in metamorphic scale by classes and groups, and according to parent matter in common or ‘humic,’ splinty, canneloid and boghead types.

“Fisher’s (26 $\frac{1}{2}$) Classification employed three coordinate systems, using fixed carbon, moisture and volatile matter from proximate analyses of as-received ash-free coal; or carbon, hydrogen and oxygen from ultimate analyses.

"Stansfield's Classifications employed volatile matter, moisture content and calorific value on comparable (corrected) ash basis."

[fol. 382] The reason I wanted to read this was to show the many varieties.

By Examiner Newcomb:

Q. Have you finished reading that book now?

A. Yes, sir.

By Mr. Machugh:

Q. What was the name of the author; will you state that, please?

A. Thom.

By Mr. Riddle:

Q. Mr. Plein, Frazier also had a method?

A. Yes, sir, that is the same as Johnson's. I read that.

Q. Mr. Frazier's was a proximate analysis, was it not?

A. Yes, sir.

Q. This that you put on the blackboard now is Johnson's; was dry, ash-free. Now, I wish you would put the equation used by Mr. Denman in his testimony, which was by Frazier?

A. Can we raise that question later?

Mr. Gregory: Mr. Examiner, may I ask a question here?

Examiner Newcomb: Go ahead, Mr. Gregory.

By Mr. Denman:

Q. But he does not use the same analyses. He used just [fol. 383] a proximate analysis. This is dry, ash-free coal. He uses a different analysis from what Johnson used; at least what you have written on the blackboard.

A. A proximate analysis of a coal gives you the moisture, the volatile matter, the fixed carbon, ash, sulphur, B.T.U. From that proximate analysis you calculate by mathematics these other bases of dry coal, moisture, ash, ^{and} free coal, and you must go to the fixed carbon divided by volatile matter on the dry, ash-free coal in order to classify coals by rank because the ash content is a matter of variation, dependent on the preparation and the kind of seam it is. It does not help to classify coals by rank unless you eliminate those

factors. The classification of coal by Johnson or by Frazier is on this basis of the fixed carbon divided by the volatile matter.

Q. You are familiar with the Collier survey, are you?

A. I am familiar with it, but I have not read it through carefully or studied it.

Q. Well, in his report he only takes the fixed carbon divided by the volatile matter, to use the proximate analysis, and it works out the fuel ratio there which coincides with the method that he states, and he states the method.

[fol. 384] A. Perhaps that is another method they have of classifying coals. You have, as I understand it, already introduced Collier's paper in the evidence.

Q. Well, it was not designed by Mr. Collier. He quotes and states right in his report that this is Mr. Frazier's method, and then goes on and figures out the fuel ratios of all the coals that he examined at that time in Arkansas under that method.

A. Well, in my opinion, then, that is just another method of classifying coal on a different basis. I doubt its value. All of these various methods of classifying are very confusing when we come to the practical side of determining what coal is and how to sell it and so on. Campbell proposed certain classifications and classified coals in various ways. He changed his fuel ratios slightly from time to time. However, in 1926 the Coal Mining Institute of America proposed to the American Society for Testing Materials that a study be made for the classification of coals. A committee was appointed about a year later. I believe it was July 14, 1927—the exact date is immaterial—but it was ten years ago that this study was started. From time to time this committee appointed by the American Society for Testing Materials held meetings in New York, Pittsburgh, Washington, at which representative men of the coal industry were present. I think it would be well for the record [fol. 385] if the membership of this committee be introduced into the record. I think it is important to show who these men are and where they are from and what they represent.

Examiner Newcomb: You may do so, Mr. Plein.

Mr. Machugh: Is it being offered for identification, Mr. Waldron?

Mr. Waldron: Yes, sir.

Mr. Riddle: I offer it in evidence.

Mr. Waldron: Marked for identification as "Commission's Exhibit 11."

By Mr. Waldron:

Q. I will hand you Commission's Exhibit 11 and ask you to state what that is, if you know?

A. The committee appointed by the American Society for Testing Materials back in 1927, of course, has changed considerable. That is men have quit and other men have been put on, and I have no record of who the various people were that were on this committee, but this paper here, which is called "General Circular No. 1, as revised April 5, 1937. Personnel of sectional committee on classification of coal. Sponsor: American Society for Testing Materials," was given to me by Mr. Fieldner, who is chairman of this committee and chief of the technologic branch of the Bureau of Mines. It was mimeographed by the National [fol. 386] Coal Association in Washington and these extra copies were received from Mr. Streeter, a representative of the National Coal Association.

Mr. Riddle: I ask the Examiner that Commission's Exhibit No. 11 be admitted in evidence.

Examiner Newcomb: So admitted.

(General Circular No. 1, referred to above, was marked for identification as "Commission's Exhibit 11," and was received in evidence.)

The Witness: The point I wanted to make on this is that the organization is representative. It is not necessary to read them all, but they are quite varied. There is a representative of the Bureau of Mines, United States Geological Survey, National Coal Association, and so on, Anthracite Institute of Pennsylvania. This committee appointed an executive committee, which is shown on page 3 of this exhibit, and they were the men that had to buckle down and do the work. Among those people, I would like to point out the fact that T. W. Harris, Jr., Division Purchasing Agent, E. I. duPont de Nemours & Company, is on that executive committee. This general committee appointed a technical committee on coal classification, to make investigations as to the various ways coals might be classified. On the right-hand side of the page is classification P.C.G.I.

[fol. 387] P. means purchaser; C. means consumer. G. I. means a person that had a general interest in the coal industry. This man Thom whose paper I just read, you will notice is included in here. The only other thing that I would like to point out, I have looked through this paper and so far I have not found the name of any man on this committee who might have had any interest in the production or classification of Arkansas, Oklahoma or Kansas coals. I do want to say that I know quite a few of the people that are on here and they are all men of good repute. This classification that these people work on, the latest published report, I would like to introduce in evidence.

Mr. Waldron: Mr. Examiner, I would like to have this marked for identification as "Commission's Exhibit No. 12."

(Printed pamphlet published by American Society for Testing Materials was marked for identification as "Plein Exhibit 12.")

By Mr. Waldron:

Q. Mr. Plein, I hand you Commission's Exhibit No. 12, marked for identification, and ask you to state what that is, if you know?

A. That is a printed pamphlet published by the American Society for Testing Materials, 260 South Broad Street, Philadelphia, Pennsylvania. The title is "Tentative Specifications for Classification of Coals by Rank. A.S.T.M. [fol. 388] designation: D 388-36T." That is the title. The "36T" of this designation refers to the fact that it was tentative in 1936. Mr. Fieldner in Washington and Mr. Barkley, both of the Bureau of Mines, informed me last week that the A.S.T.M. had approved this last month, during the week of September 20th, as a standard classification of coals accepted by the A.S.T.M. In order for this classification of coal to have been approved by the American Society for Testing Materials it was necessary that the technical committee approve everything that is given here. After they approved it, it passed on to the general committee. To get out of their hands, as finally approved again a two-thirds vote was necessary. And that is a two-thirds vote by mail, not by quorum or anything; actual mail vote. Then the A.S.T.M. had to approve it in the

same way, by a two-thirds vote. So that it has been accepted as an American standard by the American Society for Testing Materials.

Mr. Waldron: I ask that Commission's Exhibit 12 be admitted in evidence.

Examiner Newcomb: So admitted.

(Pamphlet referred to as "Commission's Exhibit 12," being marked for identification as "Plein Exhibit 12," was received in evidence.)

The Witness: May I make a further statement, Mr. Waldron?

[fol. 389] Mr. Waldron: Yes, sir.

A. The Sunshine Anthracite Company in its petition the other day introduced a classification, which as I recollect was marked "34T," which was published in 1934. This is a later standard as established by the Society. The only difference is, I believe, in the two, is that the classification of semi-anthracite in the one that Mr. Gregory introduced, the test was non-agglutinating. In this one it has been changed to non-agglomerating. And another change, which affects this hearing here, is the one that was introduced specifying that the volatile matter in low volatile coal ranged from 14 to 23 percent. In this classification it ranges from 14 to 22 percent.

Mr. Machugh: Mr. Examiner, may I suggest, if Mr. Plein is qualified to do so that he may explain those two terms, "non-agglomerating" and "non-agglutinating," for some lay person that may read the record.

By Examiner Newcomb:

Q. Will you do so, for the record, Mr. Plein?

A. The non-agglutinating test is no longer used, for the reason that they have never been able to reproduce the same test on the same kind of coal over a period of years. The non-agglutinating test, or rather the glutinating test, you mix various portions of sand with coal, in ratios of fifteen to one and you heat it at certain temperatures and then see [fol. 390] how many kilograms the button will hold. But as I say they have never been able to reproduce the test because any slight variation in the quality of the sand, if they do not get sand from the same quarry to run the test they go

hay-wire on it. So they dropped that and worked out this agglomerating test, which is very simple and an inexpensive test to make. In the determination of the proximate analyses of coal a gram weight of coal is placed in a crucible and heated to 950 degrees Centigrade for seven minutes. What remains in this crucible is removed from the crucible; if it falls out as a powder or is granulated, it is non-agglomerating. However, if it swells or shows coking or will support a weight of five hundred grams, that is approximately half a pound, it is called agglomerating. It is a very simple test to make in the ordinary proximate analyses of coal.

By Mr. Machugh:

Q. Will you repeat that test again?

A. The non-agglomerating?

Q. Yes.

A. Yes, sir. In determining the volatile matter of coal you place a weighted sample of coal, about one gram, in a crucible and heat it to 950 degrees Centigrade for seven minutes. Then what remains may be a button or it may be a powder. If it is a powder, it is non-agglomerating. [fol. 391] If it is a button, it can be removed carefully from the crucible and placed on the edge of the table and a five hundred-gram weight put on it, and if it supports that weight without pulverizing it is agglomerating. If it crushes, it is non-agglomerating. The Bureau of Mines has not published any recent data on this test. However, I have a paper here which might help to clear this thing up and show what their chemists are doing in standardizing this test. It is not an official paper. I cannot enter it in evidence. It is a part of my case which I went into before I came down here; it shows about the same thing as I have stated here. May I read it?

Examiner Newcomb: Certainly.

A. This is "agglomerating properties of coals based on examination of residue incident to the volatile matter determination." Designation: non-agglomerating. Button shows no swelling or cell structure and will not support a 500-grain weight without pulverizing. Group na, which means non-agglomerating. Appearance: The residue from standard method for determination of volatile matter of coal. na, non-agglomerating residue. na (b): Coke button shows no

swelling or cell structure, and after careful removal from the crucible will pulverize under a weight of 500 grams carefully lowered on the button. If it does not meet those specifications it is agglomerating.

[fol. 392] Q. Mr. Plein, will you state accurately the source of that information?

A. It is a part of my notes.

Q. From what source?

A. From conversations with Mr. Barkley of the Bureau of Mines, who is on this committee of the A. S. T. M.; he is a consulting engineer of the United States Government in the purchase of coals.

Q. Immediately prior to the time you came here?

A. Last Friday, I think that was discussed. It is not an official publication.

Mr. Machugh: Thank you, Mr. Plein.

Examiner Newcomb: You may proceed, Mr. Plein.

A. There are many things going through the mill that are not in print. The analyses which I have seen submitted so far in this problem have not, in any case submitted, any report of tests, as to whether the coal is non-agglomerating or agglomerating.

By Mr. Riddle:

Q. Have you observed these samples that they introduced here, Exhibits 1 to 6?

A. Yes, sir.

Q. The physical characteristics and appearance and friability and so forth?

A. Yes, sir.

[fol. 393] Q. From your experience tell the Examiner what classification these coals are in, with reference to being anthracite or bituminous.

A. Well, this first one here is a very fine anthracite coal. There is no doubt about that, that it is Pennsylvania anthracite coal.

Mr. Machugh: These are Commission's Exhibits 1 to 6, are they not, Mr. Riddle?

Mr. Riddle: Yes, sir.

The Witness: All the other samples or exhibits rather, are definitely not anthracite coal.

By Mr. Riddle:

Q. Mr. Plein, were you through with your classification testimony?

Mr. Gregory: No, he was not through.

Examiner Newcomb: No. You interrupted him, Mr. Riddle. He had not finished discussing his classifications, on giving his expert opinion.

By Mr. Riddle:

Q. If you have anything further you may proceed.

A. When I wanted to say on this was; in reference to this classification that is sponsored by the A. S. T. M. It sets down certain definite chemical limits for the classification of coal. It has no power to impose a classification in any legal [fol. 394] manner upon anyone. It is just the results of ten or eleven years of work by many men interested in the coal industry. I think it is worth bringing out also how they probably arrived at the limits for semi-anthracite coal in this specification. One of the problems of the committee was to determine what the boundary lines would be for the various ranks of coal. One of the results of this investigation was a paper that was published before the American Institute of Mining Engineers. The senior author was W. A. Selvig of the United States Bureau of Mines. In their laboratories in Pittsburgh, of the Bureau of Mines, they averaged the analyses of many coals from many states, from the records which had been published or were available to them. Each sample as it was taken at the mine over these many years was classified by the engineer who collected the sample. If he went to a mine in Franklin County, Illinois, and collected a sample, he was told it was bituminous coal, he marked it "bituminous coal" on his record. If he went to a mine in southern West Virginia, in Raleigh County, and he was told it was semibituminous coal, he marked it "semibituminous." If he went to Virginia, in the hard coal fields and was told it was anthracite, he marked it "anthracite." If he came down here and took it in Sebastian County and some one told him it was anthracite—he may have been told it was semi-anthracite, [fol. 395] he may have been told it was semibituminous—the same way in these other fields—that gave these men a record of analyses to compare with names of coals as recognized

by the producers themselves. They averaged these out and came out with these results. I do not want to enter this book or this in testimony. I am just reading from this to get these figures exact. I have not attempted to memorize all of these things, and you will just have to take my word that what I am reading here—

Q. (Interrupting.) What are you going to read?

A. Just about a sentence or two.

By Examiner Newcomb:

Q. State for the record from what you are reading, please, Mr. Plein.

A. All right. I am reading from the transactions of the American Institute of Mining and Metallurgical Engineers, Volume 108, 1934, published by the American Institute of Mining and Metallurgical Engineers, at 29 West 39th Street, New York City.

By Mr. Riddle:

Q. Reading from what page?

A. I am reading from page 190, a paper called, "Classification of Coals of the United States According to Fixed Carbon and B. T. U.," by W. A. Selvig, W. H. Ode, and A. P. Fieldner.

[fol. 396] By Examiner Newcomb:

Q. Would you give a brief background of the authors of that article, for the record, please, Mr. Plein?

A. Yes. I do not know who Mr. Ode is at all. Mr. Selvig has been with the Bureau of Mines a good many years as a chemist in the analyses and studies of coals. Mr. Fieldner has been with the Bureau of Mines before it was the Bureau of Mines; when it was a part of the United States Geological Survey. He was in charge of the Pittsburgh station of the United States Bureau of Mines for a good many years as its superintendent. He was transferred to Washington about 1928 to be chief engineer of the experiment stations, division of the Bureau of Mines. About a year ago he was appointed chief of the technologic branch of the Bureau of Mines, the highest position in the Bureau of Mines, open to anyone interested in the study of coals and methods. I would like to read from page 190.

And the reason I want to read this is, as I say, these figures were arrived at by taking these analyses of what the operators call their coals.

(Reading.) "Coals designated as semi-anthracite in United States Bureau of Mines publications were plotted from Sullivan County, Pennsylvania, and from Arkansas and Virginia. In all fifty-five mine samples from thirty-seven different mines were available, of which twelve were [fol. 397] from Pennsylvania, eleven from Arkansas, and thirty-two from Virginia. On a dry mineral matter free basis these mine samples come within the limits of 86 to 92 percent fixed carbon. The samples from Sullivan County, Pennsylvania, ranged from 89.5 to 92 percent. Those from Arkansas ranged from 86 to 90 percent, and those from Virginia from 86 to 91 percent fixed carbon."

I think that sort of testimony sort of ties in with what has already been brought into the record as to the nomenclature of the coal down here. I do not think it settles anything in so far as how the Act may be interpreted, but it does indicate how the committee may have arrived at these limits for semi-anthracite coal. There is only one other thing I would like to point out about this A. S. T. M. method of classifying coals as very little recognition is given to the physical characteristics of the coal other than that this agglomerating test draws the line between—helps draw the line between semi-anthracite and low volatile bituminous, and then at the lower edge of the scale they use weathering and slacking properties to distinguish between subbituminous and lignite.

Examiner Newcomb: We will take a five-minute recess.

(Thereupon, a brief recess was taken.)

[fol. 398] Examiner Newcomb: You may proceed, Mr. Riddle.

By Mr. Riddle:

Q. Mr. Plein, do you have something else to offer?

A. Yes, sir.

Q. Mr. Plein, tell the Examiner whether there has been any real, fixed, definite standard for the classification of coal adopted by any of the departments of the Government or any legal standard classification.

A. Well, of course, Congress has never passed on the classification of coal. The departments call for different kinds of coal in their bids, but I do not see that that establishes any standard of classification—any legal standard of classification of coal. The Bureau of Mines publications, wherever classification of coal is mentioned, has no reference to this final approved A. S. T. M. method. Of course, they may refer to the A. S. T. M. standard, tentative standard, but the Bureau of Mines has no authority to pass any legislation, of course. The quartermaster corps calls for different kinds of coal. That again is not, in my opinion, any legal classification of coal. It is largely a nomenclature that has been used for years.

Q. They always have to specify which classification?

A. Well, they call for a bituminous coal ranging between ten and twelve percent ash, not more than two percent sulphur, not less than thirteen thousand five hundred [fol. 399] B. T. U. "as received". That is the same idea. They may call for Pocahontas coal, which is a rather loose term to use in a way, and then state the specifications.

Q. What coals or what class does Pocahontas coal fall in with reference to classification?

A. Pocahontas coals—the name originally comes, as I understand, from the town of Pocahontas in Tazewell County, Virginia, along the N. & W. Railroad. The name is also applied to coals from the Pocahontas field in southern West Virginia, the Tug River field of southern West Virginia, the New River field of West Virginia. The coal is sold as Pocahontas coal. Coal from the New River field is quite often called and sometimes sold as Pocahontas coal. The name is rather a misnomer, but if anyone buys Pocahontas coal and gets New River coal they get just as good quality. They get low volatile smokeless coal.

Q. That is semibituminous coal?

A. Yes, sir, by the A. S. T. M. method generally recognized. There is some New River coal which does not fit in the low volatile classification here. It is a medium volatile coal. There is a boundary line in that field where it changes from low volatile to medium volatile.

Q. In your experience, Mr. Plein, how many different classifications have you observed or run into in your research work?

[fol. 400] A. You run into all these names that we have already mentioned, anthracite, semi-anthracite, semibituminous, sometimes called low volatile bituminous.

Q. Well, I mean methods, Mr. Plein. How many different methods like Johnson, Frazier, and so forth?

A. I think there are sixteen that I read off this morning, plus this A. S. T. M. method that is shown, plus these trade-name classifications, which are innumerable.

Mr. Riddle: I think you may ask him.

Cross-examination.

By Mr. Gregory:

Q. Mr. Plein, anybody can set up his own classification for coal, but isn't it pretty generally recognized in your experience and in your studies that the A. S. T. M. method is the most commonly used and the one most depended upon?

A. The reason I introduced this membership of the committee was to indicate its widespread acceptance by many people.

Q. Does that committee represent people in all lines of business who are not interested in the classification of coal for the purpose of selling it, or for any other reason except to really find out what it is?

A. In that list they are classified by P, C, and G. I. P is purchaser, C is consumer and G. I. is general interest. [fol. 401] However, I did point out too that there were no members of that committee from the middle west but there were members possibly from Chicago, members on it who have interests in Kansas, Arkansas, and Oklahoma coals. I am not familiar with all the connections of these individuals. For instance, this man Harris, of the National Association of Purchasing Agents, undoubtedly has many wide interests. We worked with him in getting out certain figures on the consumption of coal, and he is in close contact with purchasing agents throughout the country.

Q. Have you ever heard of such a representative body spread over the number of interests like this one, or any other group of men participating in classification, that would in any way compare with this A. S. T. M.?

A. No, there has been many ideas on the classification of coal, which this committee has attempted to boil down to something short and complete, which can classify coals on simple tests.

Q. Then, if you had to take your choice, if you were setting out to classify coals, that is the method you would follow, isn't it?

A. I would say that is a very good method of classifying coals, but I cannot say that that is the legal answer to it.

Q. I just asked you a question. Do you want to answer [fol. 402] it?

Mr. Riddle: He answered it.

A. That answer I gave—let me see if I stated myself—

Examiner Newcomb: Let the reporter read the question and the answer.

(The question and the answer were read by the reporter.)

Examiner Newcomb: Mr. Plein, do not be disturbed over what you think may be the legal answer. You are a scientist or a mining engineer. Answer the question in the best way you can.

A. I would accept it as the best method of classification that has been arrived at by a representative group of men.

By Mr. Patterson:

Q. Mr. Plein, I believe you testified, on page 190 there, that certain samples of Arkansas coal showed to be above eighty-six percent fixed carbon and were considered as semi-anthracite. From the statement you read there?

A. That is right.

Mr. Patterson: That is all.

By Mr. Machugh:

Q. I believe in response to a question by Judge Riddle that you characterized a specimen of coal that was marked Commission's Exhibit No. 1 as anthracite coal. Am I [fol. 403] correct in that?

A. From Pennsylvania, of that kind.

Q. Did you examine the other specimens of coal, which have been marked as Commission's Exhibits 2 to 6, inclusive?

A. Not this morning.

Q. Did you examine them at the time they were introduced in evidence?

A. Yes, sir.

Q. How would you characterize those Commission's Exhibits 2 to 6?

A. Well, I have to go by both the physical and chemical characteristics of coal to determine what rank it should fall in. We have no chemical analyses of these individual specimens available, of these individual samples, Commission's Exhibits 2 to 6. All we can go by, therefore, is the physical characteristics of these particular pieces as they lay before us. I have seen coal in the New River fields, parts of beds in these New River fields which, as I have already said, is sometimes described as Pocahontas coals, in which the individual part of the bed was as hard as these. Physically, therefore, they looked somewhat like low vol... coals in certain areas in West Virginia. In other areas of West Virginia I have seen beds of low volatile coal, in [fol. 404] West Virginia, where the whole bed was very friable and soft. We have no physical tests at all here showing the friability of those coals or anywhere, comparing their friability with coals of low volatile rank from central Pennsylvania or southern West Virginia. The anthracite coals have a distinct conchoidal fracture.

Q. Mr. Plein, I see you have characterized Exhibit No. 1 as Pennsylvania anthracite. That is just from observation and from personal experience?

A. Yes, sir.

Q. What I have in mind is asking you to characterize those other exhibits.

A. That is what I am saying. Pennsylvania anthracite has a distinct conchoidal fracture. Conchoidal means like a shell; it is cupped in. The low volatile coals have a distinct bedding plane. Commission's Exhibit No. 2—

Q. (Interrupting.) Identified as "Commission's Exhibit No. 2"?

A. (Continuing.) —has these distinct bedding planes which you see in every bituminous coal or semibituminous coal. It also has distinct cleavage planes similar to low volatile coal. Bedding planes are horizontal and cleavage planes are vertical, with reference to the way the coal lays in the mine. Those are measurements which are qualitative, not quantitative measurements.

[fol. 405] Q. Judging purely from appearance, how would you characterize the specimens of coal marked Commission's Exhibits 2 to 6, inclusive?

A. You cannot characterize it because, in my opinion, you do not have enough evidence to put it in any group. From my experience it is possible when a coal is put before you to place it somewhere in the ranks of coals. You can recognize anthracite, you can recognize bituminous coal, like the Pittsburgh coal bed. It has a distinct bed plane and a distinct cleavage plane. When you get near a margin it is rather difficult, in my judgment, to determine just where it lies.

Q. It is impossible for you to see say from experience, then, whether Commission's Exhibits 2 to 6 are semibituminous coal, bituminous coal, or anthracite coal?

A. Well, you cannot do it, for this reason. No one has set up a measurement of the physical characteristics to be used in determining what a coal is. You understand, of course, that there are Pennsylvania bituminous coals that are very hard, just as hard as Pennsylvania anthracite. As far as I know no one has made any tests by which you could clearly relate the physical characteristics of coal. They have attempted to but they have run into difficulties in repeating their tests and they find such variations that you cannot classify them. If you are going to use the [fol. 406] A. S. T. M. method you have to rely on the chemical tests. If you should rely on the physical tests, then it is a matter of judgment and opinion, and as I say, you have these feelings, that there are border lines in which it is possible for you to give a bad judgment, and there is nothing for you to do but say, "I do not have enough information to classify it by its physical appearance." I will say this, however, that this coal looks more like semibituminous than it looks like anthracite.

Q. Where do you understand these specimens of coal marked Commission's Exhibits 2 to 6 came from?

A. I believe they have been admitted as evidence and that they are from certain mines.

Mr. Riddle: The record shows.

Mr. Gregory: This alleged sample from the Sunshine mine was purportedly taken from a car out there when our night watchman was not looking, and the coal has not been identified and we don't have the car number or anything else.

Mr. Riddle: The gentleman who brought the exhibit in identified it as having taken it from the car at the tippie,

at the Sunshine mine, and his testimony is in the record. He was sworn to testify and he testified to that, and I think the record ought to stand just that way.

Mr. Machugh: That is my understanding.

Mr. Gregory: That is all right. We have already ad-
[fol. 407] mitted it in evidence.

By Mr. Machugh:

Q. Mr. Plein, did you examine the exhibits which have been introduced by the petitioners, which are also specimens of coal and marked "Petitioner's Exhibits O, P, and Q"? Have you examined those specimens?

A. They were the small pieces of coal, as I recollect.

Q. Would you be able to characterize those from appearance, with respect to whether or not they are bituminous, semibituminous, or semi-anthracite coals?

A. Are they here now?

Q. While we are waiting for them, where is it your understanding that Petitioner's Exhibits O, P, and Q came from?

A. I think they testified themselves that Mr. Schull had taken them yesterday morning at six o'clock from car number so and so and brought them here.

Q. At what mine?

A. Sunshine Anthracite mine. I think I would say the same thing as to all these that I said of Commission's Exhibit 2. This Petitioner's Exhibit P looks very much like some of the New River coal I have seen, but again that is a qualitative measurement.

Q. What kind of coal is the New River coal?

[fol. 408] A. To be exact, some of it is low volatile and some of it is medium volatile, according to the A. S. T. M. specification.

Q. What does that mean with respect to bituminous, semibituminous, or semi-anthracite?

A. The highest rank is meta-anthracite. Then comes anthracite, semi-anthracite, low volatile bituminous, medium volatile bituminous, bituminous. Now, the New River coals range from low volatile bituminous to medium volatile bituminous.

Q. And one of the specimens which was introduced as petitioner's exhibit in this case resembles the New River coal?

A. It resembles part of the beds of coal that I have seen in the New River field, which range from low volatile to medium volatile in rank.

Q. How is that with respect to bituminous or semibituminous?

A. Low volatile is the same as semibituminous.

Mr. Machugh: That is what I wanted to know. Thank you, Mr. Plein.

Examiner Newcomb: Is that all, Mr. Machugh?

Mr. Machugh: I have a few more questions, if the Examiner please.

By Mr. Machugh:

Q. Mr. Plein, what in your opinion will be the general [fol. 409] effect of granting an exemption to the Sunshine Coal Company as a result of these proceedings?

A. That is a question of economics.

Q. If you do not feel you can answer the question, freely say so.

A. I cannot predict what is going to happen in the future.

Q. I understand it is conjectural?

A. Yes. The production in this area, according to official Government records, has not been noted in the evidence at all. It is my recollection that Arkansas produced about 1,300,000 tons of coal. Can we enter that in the record?

Examiner Newcomb: I believe somebody testified close to that figure yesterday.

A. 1,300,000 tons of production in Arkansas. The production from Pope and Johnson Counties combined, in 1935, was about 268,000 tons, somewhere in that neighborhood. The markets that it was shipped into, as I understand it, are to the north, and to Missouri, Kansas, and the Twin Cities, and so on, which markets must consume an awful lot of coal—some one testified, over eighteen million tons. 268,000 tons is not going to make much of a marked effect on the consumers in that area.

[fol. 410] By Mr. Machugh:

Q. I asked you first as to the general effect of granting the exemption, and then my next question was, what would be the effect from the consumers point of view. If you

cannot answer either of those questions you are at liberty to say so.

A. No one can answer them, I do not think.

Q. If you do not feel you can give that information, you may say so.

A. I think it is too conjectural to try to predict what might happen in the future.

Mr. Machugh: Thank you, Mr. Plein, those are all the questions I have at present, Mr. Examiner.

By Examiner Newcomb:

Q. Mr. Plein, this Arkansas production that you speak of, could you approximate a breakdown of this production by ranks?

A. The Bureau of Mines has published figures on the production of hard coal outside of Pennsylvania. In order to describe that it is necessary to enter these figures from the Bureau of Mines.

Q. Are there different ranks of coal produced in the state of Arkansas?

A. The Bureau of Mines has generally recognized that there are different ranks of coal produced in Arkansas, [fol. 411] and I can say "Yes, there are," because there is some semibituminous and I believe in the past there has even been a little lignite produced down in the southeast corner of the state, and it is probable that there is some medium volatile coal also produced and maybe some semi-anthracite.

Q. As an expert, do you know if there is any semi-anthracite coal produced in this state?

A. The analyses which have been submitted show that there is a coal which would classify under the A. S. T. M. method as semi-anthracite. It has been sampled and it has been determined as such. I cannot testify that any particular mine is producing semi-anthracite other than the analyses which had been submitted, principally in Bulletin 847-E of the United States Geological Survey, which were taken recently and definitely indicate the mine that they were taken from, and from the reports of the mine inspector of the state of Arkansas it is possible to tie in these mines with the present production.

Q. Is there a map available showing the production in the state of Arkansas?

A. There is no map available showing the production, but there are maps available showing the character of coals in the United States as determined by Mr. Campbell.

Q. Do you have one of those maps?

[fol. 412] A. Yes, sir.

(A discussion was had off the record.)

By Examiner Newcomb:

Q. Mr. Plein, I show you a map, entitled "Coal Fields of the United States, by Marius R. Campbell, 1926," and over in the left-hand upper corner "Proceedings, International Conference on Bituminous Coal, Carnegie Institute of Technology, Pittsburgh, Pennsylvania." First I would like — inquire who is Marius R. Campbell, the author of this map?

A. Mr. Campbell, is one of the leading coal geologists in the United States. He served with the United States Geological Survey for a good many years. I have known him personally. I met him in Washington. I met him in the field. He wrote this professional paper 100-A of the United States Geological Survey. He has written for various technical societies. He is a member of the American Society for Testing Materials Committee. I am not certain that he was a member during the last year, but I am positive that he has been a member of the A. S. T. M. committee on classification of coals by rank. He prepared and read a paper before the First International Conference on Coal at Carnegie Institute of Technology in Pittsburgh, in 1926. This map was a part of his paper which he presented.

[fol. 413] Q. Would you care to comment about this map, confining yourself as nearly as possible to the matters—

Mr. Machugh: Mr. Examiner, has this map been marked for identification or offered in evidence at all?

Examiner Newcomb: No.

Mr. Gregory: We are going to ask the witness if he will exhibit that or a copy of it as an exhibit to his testimony. It may be a traced map with designation of kind and character of coal on it.

The Witness: May I suggest that if you company wants to introduce it, that I will lend it to you, to be photostated and the colors marked in on the photostat. It is impossible to photostat the colors.

Mr. Gregory: We will accept that.

Mr. Patterson: The record will show that he is willing to furnish us that map to be photostated.

Mr. Machugh: Will you give it a number of some kind?

Examiner Newcomb: Let the map be marked as an exhibit.

Whereupon a map with the title "Coal Fields of the United States," was marked for identification as "Plein Exhibit 13." (A)

(A discussion was had off the record.)

A. This map only shows, according to Campbell's idea as to the ranks of coal occurring in different parts of the United States. The fact that there is coal in these areas is [fol. 414] pretty well known and proven. The rank of the coal is another matter. Campbell has marked this map with these colors: Red for anthracite, and his footnote says "Anthracite, dark color; semi-anthracite and anthracite." Campbell, therefore, believes that in Pennsylvania, in Virginia, in Arkansas, ~~New Mexico~~, and in Colorado there are some semi-anthracite beds of coal. It does not prove at all that that kind of coal is being produced in these areas. Campbell's map does not show any semi-anthracite or anthracite in New Mexico. That is probably an error there or that may have been developed since 1926. It also shows in Arkansas what he calls semi-bituminous coal. The whole thing—this map shows the area of the United States undermined by coal beds, and Campbell's ideas as to the classification of these coals in these particular areas.

Examiner Newcomb: Mr. Waldron, would you like to interrupt and ask a question?

Mr. Waldron: Yes, if the Examiner please, pertaining to the map.

By Mr. Waldron:

Q. A great deal of this information, when these maps are being set up, was secured by a man like Campbell or anyone else coloring the maps, from data secured from the Bureau of Mines publications or by writing to particular areas and contacting geologists, state geologists, and taking [fol. 415] ing information secured therefrom and then coloring it? Isn't that correct? In other words, Mr. Campbell

has not gone over every coal field in the United States to ascertain whether or not the coal is anthracite, semi-anthracite, bituminous, sub-bituminous, semi-bituminous or lignite, has he?

A. Well, Mr. Campbell has been in pretty nearly every coal field in the United States, I believe. However, this is a map in which you bring together all of the information which is available on the ranks of coal in the United States. It is based on reports of the United States Geological Survey, Bureau of Mines, Mr. Campbell's personal experience in these fields and his judgment as to the ranks of the coals. He could not possibly have measured in the field the boundaries of these coal fields and their rank, but he has been in a good many coal fields and no doubt has talked to many geologists who have studied fields in which he has not been located. He personally cannot prove from his own experience that such and such is the case, but if any man can talk about and draw maps of this kind it is Mr. Campbell. But I want to make it clear that this shows his idea of the ranks of the coal available in these areas. It does not show whether they are produced or not. For instance, this map shows lignite in Alabama, Mississippi, and Louisiana. We know there is no coal production at all in Louisiana or [fol. 416] Mississippi.

Q. In other words, the mere fact that he selects a certain color scheme to represent one type or another of a particular coal may or may not indicate that that is true or that that kind of coal exists under the color scheme that he has placed on it?

A. That is right. It indicates that in his opinion there are semi-anthracite coals in Arkansas, but it does not prove what mine may be mining it or if it is being mined at all.

Q. Or he may be mistaken in coloring the map? It is possible that he may be mistaken in his colors, isn't it?

A. I do not think so.

Q. You mentioned one of the fields over near the left that he left out?

A. New Mexico?

Q. Yes.

A. Yes. He does not show any red spots around the Albuquerque and Sirrilos field.

Q. Is he correct in Mississippi and Louisiana?

A. In showing that there are coal beds there?

Q. Yes.

A. Yes, I presume he is.

Q. Do you know that he left any out?

A. Not that I know of, no, sir. I could not answer that [fol. 417] because Louisiana and Mississippi are not coal states and very little work had been done on the geology of coal there as compared with Pennsylvania, West Virginia, and Arkansas.

Mr. Waldron: That is all.

Mr. Puterbaugh: Mr. Examiner, may I ask Mr. Plein a few questions?

Examiner Newcomb: Certainly, Mr. Puterbaugh.

By Mr. Puterbaugh:

Q. Mr. Plein, what is the scale of that map?

A. One in seven million, which means one inch equals seven million inches on the map. That is approximate, as near as I can judge without scaling it. One inch equals one hundred miles. And when you make a map of that size you cannot spot your colors absolutely accurate.

Q. Would you refer to the map that was introduced yesterday, I believe by Mr. Brawlette, as an exhibit here, and locate on that the Shinn Basin in Pope County, Arkansas?

A. On this map here?

Q. No, on the other map.

A. Which one was that?

Examiner Newcomb: Exhibit No. 8.

By Mr. Puterbaugh:

Q. Can you by a comparison of those maps identify that small red spot on Mr. Campbell's map as being identical with the coal deposits in Pope County which is known as the Shinn Basin and is commercially known as Bernice?

A. Let's have this other map.

Mr. Machugh: Mr. Examiner, may I ask a question? If the map—that map be identified in some way before it becomes confused with the other map.

A. Referring to Commission's Exhibit No. 8, geological and economic map of sections of Arkansas coal fields, from Bulletin No. 326. It does not say where—it is from the United States Geological Survey, I believe.

Mr. Gregory: It has already been described.

By Mr. Puterbaugh:

Q. Introduced by Mr. Bramlette, I believe.

A. In the first place this is a photostated map. We don't know whether it has been reduced or enlarged in reproducing it from the original. There is no scale on the map showing the scale of miles. However, there are indications on here showing the longitude and latitude, and by that we can spot this area fairly accurate on here. We have longitude and latitude on this map and we can spot it that way.

By Mr. Machugh:

Q. When you say "this map," may I ask you to state what map you are referring to?

[fol. 419] Examiner Newcomb: Map identified as Commission's Exhibit 8. What is the number of this map? It is marked for identification as Commission's Exhibit 13.

A. May I make this statement. These maps are in evidence, the originals. It takes time to figure this out here but I can easily do it from this evidence, plot it on this map, for your satisfaction.

Mr. Gregory: That is satisfactory to us.

A. You can plot the same and submit it, if that is permissible. It doesn't seem worth time to do that here now. That is a simple problem, putting those colors in.

Examiner Newcomb: Suppose you do that later.

Mr. Gregory: Yes. We can do that right after lunch or during the noon hour.

Examiner Newcomb: Now, introduce that map as Commission's Exhibit No. 13. It is so admitted.

(The map referred to, marked for identification as "Plein Exhibit 13," was received in evidence.)

By Mr. Patterson:

Q. May I ask what is the approximate length of the so-called Shinn Basin in Commission's Exhibit No. 8?

A. In miles?

Q. Yes.

A. I cannot tell from this map. It has no scale. You can locate it very definitely by longitude and latitude.

[fol. 420] Q. What I am getting at, the length of the Shinn Basin.

A. From that map.

(A discussion was had off the record.)

By Mr. Riddle:

Q. Mr. Plein, are you acquainted with this publication, "Technical Paper 100"?

A. Yes, sir.

Q. That is by Marius J. Campbell and J. A. Brown-knocker, and was published in 1929.

A. Yes, sir.

Q. By the Department of Interior.

A. Yes, sir.

Q. I will ask you, Mr. Plein, speaking of semi-anthracite coal, on page 5 of this paper, if Mr. Campbell does not use these words: "Some hard coals of the anthracite type have a fuel ratio as low as 6.5 to 7, whereas some of the soft coals have a fuel ratio as high as 7 or perhaps more. Much of the apparent difference in the fuel ratios of coals is due to differences in the methods used in the laboratory for determining the volatile matter. If gas is used as a fuel, results in different laboratories or of different times in the same laboratories do not always coincide. The best modern practice is to use the electric furnace for heating the coal." And of determination of volatile matter: "The volatile matter in Government laboratories, the [fol. 421] determinations are now made in this manner: "All analyses made at the Pittsburgh laboratory that are numbered 17,000 or higher were made in the electric furnace and show a lower percentage of volatile matter than analyses having lower laboratory numbers. For the reasons stated it is probable that fuel ratio alone cannot be depended upon to separate these two ranks but that physical properties also may have to be taken into consideration. The changing of ordinary soft coal to semi-anthracite is due to the same causes that produced anthracite except that the process has not been carried so far in semi-anthracite, possibly because the action has not been so intense. There is very little semi-anthracite in this country, so it is only a small factor in the coal trade. Such semi-anthracite as is mined usually reaches the consumer as anthracite and is

masqueraded under false colors." I will ask you if he did not make use of that language in this paper?

A. That is right.

Examiner Newcomb: We will recess until 1:00 o'clock.

(Whereupon, at 12:00 p. m. a recess was taken until 1:00 o'clock p. m. of the same day.)

[fol. 422]

Afternoon Session

(The recess having expired, the hearing in the above-entitled matter was reconvened at 1:00 o'clock p. m. of the same day, and further proceedings were had therein as follows:)

Examiner Newcomb: The meeting will come to order, gentlemen.

L. N. PLEIN, resumed the stand and further testified as follows:

By Examiner Newcomb:

Q. Mr. Plein, I will ask you the general question: Do you desire to make any further statement at this time?

A. Yes. I understand that the unit of the Coal Commission I am working in, in Washington, under Mr. Tryon is a unit that is engaged in finding facts and is not interested in the decision of any policy of the Commission. I believe Mr. Tryon has testified in that way at various hearings at which he has testified. This hearing here is not only to determine the position of the Sunshine Anthracite Company but in a general way to arrive at the different kinds of coals that are produced in Arkansas. I have had certain computations made in Washington based on analyses which have already been submitted on this A.S.T.M. method of classification, which I would like to introduce. I want to point out that in every one of these cases we can calculate [fol. 423] what the volatile matter is and the fixed carbon, on the A.S.T.M. method, but we have none showing the agglomerating or non-agglomerating characteristics of the coal. Therefore, this evidence is just a clue to its classification according to the A.S.T.M. method and not the final proof of its classification according to the A.S.T.M. method.

I would like to introduce this. I have already explained that it is just some calculations. The title of the paper is "Classification of Certain Arkansas Coals Based Upon Analyses Given in U. S. Bureau of Mines Technical Paper No. 416, Analyses of Arkansas Coals, pages 9 to 15, inclusive," and it is merely a calculation and has no evidence in it as to whether or not these samples are non-agglomerating or agglomerating.

Mr. Machugh: Is that to be marked as an exhibit, Mr. Examiner?

Examiner Newcomb: It may be admitted as "Plein Exhibit 14."

(The document referred to above was marked "Plein Exhibit 14," and was received in evidence.)

A. Another one is this Bureau of Mines "Report of Investigations," No. 3283, which gives some information on the quality of anthracite as prepared at Breakers operated by members of the Anthracite Institute in 1935. The question [fol. 424] has been raised as to the quality of coal produced in Pennsylvania anthracite fields. Nothing has been entered so far and this is the only thing I know of that is recent and reliable information on Pennsylvania anthracite. I would like to introduce this as an exhibit.

Examiner Newcomb: Let it be marked as "Plein Exhibit 15," and received in evidence.

(Document No. 3283, entitled "Report of Investigations," issued by Department of the Interior, was marked "Plein Exhibit 15," and was received in evidence.)

A. (Continuing.) I would like to—the title of this paper is "Classification of Certain Arkansas Coals by Rank, Based upon Analyses of Samples of Delivered Coal as Published in U. S. Bureau of Mines Technical Paper No. 416, pages 22 to 23." Here again we just have the fixed carbon, volatile matter, according to the formula, but we have no evidence at all as to whether or not the coal is agglomerating or non-agglomerating. I would like to introduce this as an exhibit.

Examiner Newcomb: It may be admitted as "Plein Exhibit 16."

(Document referred to above was marked for identification as "Plein Exhibit 16," and was received in evidence.)

A. (Continuing.) In order to shorten up these proceedings, I would like to ask the Examiner to take judicial notice of various publications which, if we would stop to [fol. 425] enter them in the record here we would never finish. I think they are important and that we should at least mention them here to indicate to the Examiner the sources of further information on this problem which is by no means simple. Publications of the American Institute of Mining and Metallurgical Engineers, dealing with the classification of coal. The publications of the American Society for Testing Materials. A publication by M. R. Campbell.

Mr. Machugh: Mr. Examiner, may I suggest, where the witness says, "I ask the Examiner to take judicial knowledge," that he strike that and refer to it and say, "May I refer to these papers," rather than asking you to take judicial notice of them?

Examiner Newcomb: Yes. Have the record so corrected.

A. (Continuing.) May I refer the Examiner to these publications? I will read this by title because it is a rather definite publication. Bulletin No. 25, of the Virginia Geological Survey, published at Charlottesville, University of Virginia, Virginia. The title is, "The Valley Coal Fields of Virginia, by Marius R. Campbell and others."

By Mr. Machugh:

Q. Do you have the date of that, Mr. Plein?

A. 1925. The other is a question that has arisen and [fol. 426] nothing has been entered as to the analyses of coals from other fields which might be comparable with Arkansas coals. So may I refer the Examiner to the publications of the Bureau of Mines called technical papers, various numbers, "Analyses of Oklahoma Coals," "Analyses of Virginia Coals," "West Virginia Coals," and so on. I see nothing in any of these that is harmful to either side of the case. It just brings to the attention of the Examiner additional information which would take quite long to introduce at this hearing.

That is all I have to say, Mr. Examiner.

Examiner Newcomb: Any further questions of this witness?

Mr. Gregory: If the Examiner please, I would like to ask Mr. Plein several questions.

Examiner Newcomb: Very well. Proceed, Mr. Gregory.

By Mr. Gregory:

Q. Mr. Plein, do you know whether or not the Bureau of Mines has been making any tests on coals to determine whether or not they are agglomerating or non-agglomerating?

A. Well, much of the work of the American Society for Testing Materials, as indicated in the reports and publications of the American Institute of Mining and Metallurgical Engineers, are by members or the staff of the Bureau of Mines. I mean Mr. Selvig and Mr. Fieldner. They have [fol. 427] written papers on these agglomerating and agglutinating tests and no doubt much of their work has been on samples of coal that have been furnished to the Bureau of Mines, collected by members of the Bureau of Mines, Geological Survey, and various other people.

Q. Do you know whether or not any such tests have been made on the Arkansas coals?

A. It is very probable that they have. This matter has been up for the last ten years, as I say. We have had some recent samples collected by Hendricks of the United States Geological Survey, on these Arkansas mines. It would seem that Mr. Selvig would pick samples that he knew had been collected by officials of the Government to use in determining these agglomerating and agglutinating relations. I am positive none of them are published, but they are no doubt on record there because some of his papers are based on the results of that kind of work.

(A discussion was had off the record.)

Mr. Denman: When the Sunshine Anthracite Coal Company or any other company takes samples of coal to be used in this case, we request that we be given due notice in order to have a representative present at the time these samples are taken, and that part of the quartered sample be turned over to the District Board for analyses by a laboratory different from that used by the Sunshine [fol. 428] Anthracite Coal Company.

Mr. Gregory: That is entirely satisfactory to us, Mr. Examiner.

Examiner Newcomb: Let the record show such agreement.

(Thereupon a discussion was had off the record.)

Examiner Newcomb: May we proceed now? Any further questions of Mr. Plein?

Mr. Puterbaugh: If the Examiner please, may I ask Mr. Plein several more questions?

Examiner Newcomb: Certainly, Mr. Puterbaugh.

By Mr. Puterbaugh:

Q. Mr. Plein, with reference to the classification of coals by rank, based on the analyses submitted of Arkansas coals, have you ever taken into consideration the agglomerating test?

A. All these analyses that we have been discussing here, I pointed out several times—I think it is well to restate it again. That if we classify these coals according to the A.S.T.M. method, we have no test as to its agglomerating properties or non-agglomerating properties. That remains to be proven.

Q. Therefore the tests are not really complete until that is done?

A. They are not classified as to the A.S.T.M. method of classification because that classification says "Coals between 14 and 22 percent volatile." If between 8 and 14 percent volatile and it is agglomerating, it falls in the low volatile. That remains to be shown.

Examiner Newcomb: Any further questions?

By Mr. Patterson:

Q. Mr. Plein, the witness Fowler and several others have been looking at Commission's Exhibit No. 2, and stating that it has the appearance of bituminous coal. I believe in your testimony you stated it had certain characteristics of bituminous. I will ask you if it is not a fact that the coal might have the appearance physically, outside physical appearance of being a bituminous coal and at the same time under a chemical analysis show to be semi-anthracite coal?

A. When I examined Commission's Exhibit No. 1 I stated that was definitely anthracite and that these were not anthracite.

Q. Which are "these"?

A. In answer to his question, physically they may look like semi-anthracite coal. We have no analyses on these particular samples. If we analyzed them we might find that they would fall in either class. I could not say from looking at them.

By Mr. Machugh:

Q. You are referring to Commission's Exhibits 2 to 6?

[fol. 430] A. Yes, sir. We have no chemical tests. Physically they look like semibituminous coal that I have seen in southern West Virginia.

Mr. Patterson: I believe that is all.

Examiner Newcomb: Any further questions of this witness, gentlemen? Thank you, Mr. Plein.

(Witness excused.)

Examiner Newcomb: Call your next witness, please.

J. G. PUTERBAUGH, President of the McAlester Fuel Company, McAlester, Oklahoma, was duly sworn and testified as follows:

Direct examination.

By Mr. Riddle:

Q. State your name.

A. J. G. Puterbaugh.

Q. Where do you reside?

A. McAlester, Oklahoma.

Q. What is your business?

A. I am president of the McAlester Fuel Company and several other coal companies.

Q. How long have you been in the coal business?

A. About forty-two years.

Q. Are you in business in Arkansas?

A. Yes, sir. We have several mines in Arkansas.

[fol. 431] Q. Where are they located?

A. One is at Spadra, one is in Pope County, in what is known as the Shinn Basin or Bernice district.

Q. How far is your mine in the Spadra field from the applicant's, the Sunshine Anthracite Coal Company's mine?

A. Less than a mile; about three-quarters of a mile, I should judge.

Q. Are you mining the same seam of coal that they are mining?

A. Yes, sir.

Q. What seam is that?

A. The Hartshorne vein.

Q. How long have you been mining it?

A. We have owned this mine about seven or eight years. We have been marketing coal from it for about twenty years.

Q. Are you acquainted with the Hartshorne seam as it applies to Arkansas?

A. Yes, sir.

Q. And that experience and acquaintance runs over a period of how many years?

A. Since 1902—thirty-five years.

Q. And have you also been acquainted with all other coals in Arkansas?

[fol. 432] A. Yes, sir. We have been interested in the operation of mines at Greenwood, Arkansas, in Sebastian County, and at Midland, Arkansas, in Sebastian County, and have marketed coal extensively from the Paris district mines in Arkansas, and from the smokeless mines in eastern Oklahoma, which are on the same geological vein of coal.

Q. Have you had any technical knowledge other than actual experience in the production of coal?

A. No, sir.

Q. I wish you would just give to the Examiner whatever you have to say about this vein of coal.

A. This Spadra district coal has the appearance of Pocahontas coal and all other coals produced in western Arkansas, the Paris district, Excelsior district, Jenny Lind, Midland district. The coal is not bright or shiny or brittle, as Pennsylvania anthracite coal is. It is apparently smokeless; it makes some smoke. And in the mining of it, even with machine mining, we produce about twenty-three percent slack through about seven-eighths-inch round holes, and it has been to a considerable extent marketed as Arkansas anthracite to distinguish it from the coal in Sebastian County, in Paris, which has more volatile matter in it and which has been generally marketed as semi-anthracite. I guess that neither of those names are correct according to the technicians, but they have been in use here for the

[fol. 433] past forty-five or fifty years and the consumers of coal know what is meant by that and when they order that kind of coal they know what they will get. And the Spadra district mines are under the bituminous wage contract with the United Mine Workers. The wages are fixed in the same agreement and on the same basis; the prices have been fixed in proportion to the prices on the other coals produced in Arkansas, preserving a more or less uniform differential in price with the Paris coal and the coals produced in Sebastian County, which are somewhat higher in volatile and a little softer in structure.

Q. Are those prices fixed on the basis of bituminous coal?

A. Yes, sir.

Q. All right, proceed.

A. The market has been pretty well defined as being western Missouri and eastern Kansas, eastern Nebraska, and up into the Dakotas to a small extent, and to some extent in Minneapolis and St. Paul, Minnesota. There it competes primarily with Pocahontas coal. The retail price of Pocahontas in the season of 1936-37, the winter of 1936-37, was \$14.20 in Minneapolis, and the retail price of Spadra coal was \$13.30 in the same market. At the first of September 1937 the retail price of Pocahontas coal, egg, was \$13.30 [fol. 434] and the price of Spadra egg was \$13.80 in Minneapolis. The prices are very close together and fluctuate about as those figures indicate.

Q. In appearance, with the Pocahontas, West Virginia coals and the Spadra coals, in cars, could you distinguish one from the other? Have you seen two cars alongside of each other?

A. No, I do not think that I could. In fact, I have been at Minneapolis and some of the very large coal yards there where they would have Spadra coal in one bin and Pocahontas coal in another bin and I could not distinguish the difference from the appearance. They are about the same in structure and formation, hardness.

There has been a great deal of evidence introduced in this hearing about these technical analyses and standards of classification. I think that the record itself shows that there is still an undefined, twilight zone even among the experts that have interested themselves in these subjects, and it appears that there are various standards and classifications that have been suggested by various and sundry scientific societies and engineering societies and that these

are even recently being corrected and modified to new classifications and new bases. It seems to me that in the determination of this question, in the absence of any fixed legal [fol. 435] standard or measuring stick, that we should address ourselves, Mr. Examiner, to a study of what the Congress meant by the provisions in the Guffey Act in regard to the regulation of the coal industry, and with your permission I would like to read three short extracts from the Act itself.

In the first paragraph of the Bituminous Coal Act is contained the following:

"That regulation of the sale and distribution in interstate commerce of bituminous coal is imperative for the protection of such commerce; that there exist practices and methods of distribution and marketing of such coal that wastes the coal resources of the Nation and disorganize, burden, and obstruct interstate commerce in bituminous coal, with the result that regulation of the prices thereof and of unfair methods of competition therein is necessary to promote interstate commerce in bituminous coal and to remove burdens and obstructions therefrom."

And then in the first paragraph of Part I—Organization, the Act provides:

"(a) Twenty-three district boards of code members shall be organized." And at the end of paragraph one referred to, it says: "The territorial boundaries or limits of the twenty-three districts are set forth in the schedule entitled 'Schedule of Districts' and annexed to this Act." And in [fol. 436] the annexation it says: "Arkansas-Oklahoma. District 14. The following counties in Arkansas: all counties in the state. The following counties in Oklahoma: Haskell, LeFlore, Sequoyah."

I think, Mr. Examiner, that that designation clearly shows the intent of Congress as to what was to come under the purview and provisions of this Act.

Section 17 reads as follows:

"(a) The term 'coal' means bituminous coal.

"(b) The term 'bituminous coal' includes all bituminous semi-bituminous, and sub-bituminous coal and shall exclude lignite, which is defined as a lignitic coal having calorific value in British thermal units of less than seven thousand

six hundred per pound and having a natural moisture content in place in the mine of 30 per centum or more."

Now, it seems to me that by that language in the Act which has been carefully considered by Congress inasmuch as this is the second Act that has been passed to provide regulation for the coal industry, that they have clearly indicated the districts and the coal mines that Congress intended to come under the supervision of the Bituminous Coal Board. Now, in this same annex to the Act, in Pennsylvania are included only those counties that produce bituminous coal. The annex to the Act does not include the counties in Penn- [fol. 437] sylvania that produce anthracite coal, thereby showing again that Congress intended to delineate the territory and the mines that it intended to be supervised, by designating the counties in each state which were to come under this Act, and as stated before, in respect to Arkansas, it says, "All counties in the state," and that was apparently the designation of Congress as to whether or not the coal in the Spadra field was intended to be included. The language here, which defines the words "bituminous coal" states that "the term 'bituminous coal' includes all bituminous, semi-bituminous, and sub-bituminous coal and shall exclude lignite," and as stated, it clearly defines how much moisture the lignite must contain and how many B. T. U's the lignite must contain in order to be excluded.

We have had no testimony in so far as I have been able to remember defining the term "semibituminous." We all know that "subbituminous" means coal that is low grade, approaching lignite. It is probably a high grade of lignite, immature coal that has not been subjected to enough heat and enough pressure to make a good quality of coal out of it. None of these authorities that have been quoted, so far as I can remember, tells what the Congress of the United States meant when it said that this law covers and includes semibituminous coal. In the absence of other defini- [fol. 438] tions and taking what the public and the trade in this section of the country have understood, semi means one-half, and if it is one-half bituminous I cannot conclude anything but that the other half is anthracite. And I think that it was clearly the intent of Congress in using the word "semibituminous" that it was synonymous with the word "semi-anthracite." And so I think we are splitting hairs on very fine technicalities of analyses which vary and shift when Congress by that broad term, which is in general

use and has been for many years, obviously meant every kind of coal that was produced except anthracite such as is produced only in Pennsylvania, with a very small tonnage from Virginia, a trifling tonnage from Colorado and New Mexico. It seems to me inevitable and unthinkable that it was the intent of Congress that the Commission should be called upon to go from county to county and state to state and by such hearings as we have been participating in here try to ferret out the particular fraction of percentage of carbon or volatile necessary to know which particular mines come under this Act for regulation. As a matter of fact, we all know that the idea of this regulation of the coal industry originated with the United Mine Workers of America. They called attention for many years to the fact that there was a vicious competition in the coal [fol. 439] mining business and that coal prices were demoralized and that coal operators in order to survive were cutting down wages and lowering the standard of living for coal miners and that something should be done by the Government to make it possible to stabilize the prices at some figure above the cost of production so that labor would not suffer and carry the brunt of unlimited competition. And whether we like it or not, that Congress concluded that labor was right, and they passed this Act, and ninety-eight percent of the producers of coal outside of Pennsylvania anthracite, which is not included, throughout the entire country, have accepted it and are attempting to give it a fair trial. And it is obvious that the intent of Congress would be completely defeated if in this part of the country one or two or three mines would be exempted and allowed to be free from the supervision which the Bituminous Coal Act provides for the rest of the mines. And I do not think there is any theory on which we can reconcile the language of the Act or the intent of the Congress with the idea that based on fluctuating and uncertain tests promulgated and recommended by various and sundry societies of mining engineers, mechanical engineers, and purchasing agents and establish for their own guidance could set aside the broad language of the Act, which obviously intended to include all coal except that that was [fol. 440] definitely anthracite coal.

Q. What is your opinion, with all of your experience here in the Arkansas and Oklahoma fields, as to whether or not

there is any anthracite coal in the states of Arkansas and Oklahoma?

A. No, sir, there is not.

Q. And whether or not there is any semi-anthracite coal?

A. Frankly—

Q. You do not see the point.

A. I don't know what the definition of semi-anthracite is. I have been in the coal business and I have been selling Arkansas coal for forty-two years, but these definitions are rather a new thing and there seems to be a variety of them.

Q. Isn't it true that this has been used for marketing purposes rather than telling the actual truth about the kind of coal being sold?

A. Yes, sir, that is true. The Spadra field was opened along somewhere about 1894 or 1895. There was a Jew by the name of Abe Stiewell that opened the first mine down there, called it the "Jew Slope," and in order to introduce this coal and get attention in the market he called it anthracite because it was low in volatile, and from that time on each additional producer and sales agent has called [fol. 441] it Arkansas anthracite.

Q. That is the reason for the selling under that trade name?

A. Yes, sir.

Q. Now, this Spadra field is contiguous to all the rest of the fields and lies, this seam lies over what is known as the Hartshorne sandstone?

A. That is right.

Q. And that is the reason that it was named the Hartshorne vein?

A. Yes, sir. That vein is continuous from Spadra south to Scranton in Logan County, and westward through Sebastian County and on into Oklahoma. It goes for one hundred and fifty miles west of the Arkansas line to what is known as the town of Hartshorne and McAlester and on southwest of there about fifty miles to Colgate. The coal varies in thickness and quality in different localities but it is all the Hartshorne seam of coal.

Q. And that is the same vein that is being mined by all these petitioners here and it is the same vein that you have mined for years?

A. In the Spadra field, yes, sir.

Q. In the Spadra field. How many mines are there over in the Spadra field?

A. I think there are ten.

[fol. 442] Q. They are all mining the Hartshorne seam?

A. They are all mining the same identical vein of coal. The only difference is that there is what is known as the north crop, which includes the McKinney Coal Company, and the Diamond Anthracite Coal Company, which are slope mines working from the north outcrop of the coal. The coal has a thinner overburden and the rest of the mines are shaft mines with one exception, at the southeast corner of the field, which is a slope mine. And there is very little variation in the analyses, so far as I know.

Q. You consider that you have all the time been mining what kind of coal in the Spadra field?

A. We consider that we have been mining Spadra coal. We have never been called upon to classify it technically, as we are attempting to do here today.

Q. As a practical operator who has operated the mines for years, what do you think it is?

A. In the light of the information that I have, it is semibituminous. It is semibituminous coal.

Examiner Newcomb: We will take a five-minute recess, gentlemen.

(Thereupon, a brief recess was taken.)

Examiner Newcomb: You may proceed.

Mr. Riddle: The Commission now offers in evidence [fol. 443] "Coal," by Elwood S. Moore, from page 106, Campbell's classification, that we just referred to.

By Mr. Patterson:

Q. Mr. Puterbaugh, did you have this copied from some work?

A. Yes, sir, from that book there (indicating).

Mr. Riddle: We offer in evidence Exhibits 17 and 18.

Examiner Newcomb: So admitted.

(An extract from page 106, Campbell's classification, entitled "Coal," by Elwood S. Moore, above referred to, was marked for identification as "Puterbaugh Exhibit 17," and was received in evidence. A map of the coal fields of Arkansas was marked for identification as "Puterbaugh Exhibit 18," and was received in evidence.)

By Mr. Riddle:

Q. Now Mr. Puterbaugh, if you have any further statement, proceed with it and make it as brief as you can.

A. All right, sir. Mr. Examiner, I wish to call particular attention to the fact that according to Mr. Plein's testimony there are large numbers of scientists, chemists, assayers, and experts and many of them have somewhat different ideas as to the classification of coals and particularly as to where we pass from bituminous to anthracite or semibituminous to anthracite, and these engineering societies [fol. 444] and testing societies are attempting to perfect their rules and standards from time to time and from year to year and even within the past month have changed some of the standards according to their views that were in effect.

Mr. Gregory: Mr. Examiner, may we have the witness specify the societies that he keeps referring to? Have him name the societies.

The Witness: Yes, sir, I will be glad to. One of these societies that has been referred to and quoted is the American Institute of Mining and Metallurgical Engineers. Another one is the American Society for Testing Materials. There is another one, the A. S. T. M.

By Mr. Gregory:

Q. That is the same one.

A. No, there is another one.

Q. There are only two societies, aren't there?

A. Oh, there is a dozen of them.

Q. Name them, please.

A. I have reference to several of them here. I think I could get this book that Mr. Plein had here and probably save time in reading them off. They are included in his testimony.

Q. Just the two societies?

A. Different ones.

[fol. 445] Mr. Riddle: Seventeen, he said.

Mr. Gregory: Seventeen individuals.

The Witness: A great many individuals and several societies.

Examiner Newcomb: For your information, Mr. Gregory, he was reading from a book published by the American Institute of Mining and Metallurgical Engineers, Incorporated.

Mr. Gregory: That is one of the two.

The Witness: There is another one.

Examiner Newcomb: That is known as the A. I. M. E.

Mr. Gregory: That is the other one.

A. No. There was one called the A. S. T. M.

(A discussion was had off the record.)

Examiner Newcomb: The petitioner has the right to know the names of the societies that Mr. Puterbaugh is referring to.

Mr. Riddle: If he cannot remember all of them, it does not matter.

Mr. Gregory: I do not like this constant reference that there is a great number of societies and none of them know what they are doing. If there are and they made changes, it is simple to name them and specify them.

(A discussion was had off the record.)

The Witness: One is the American Society for Testing Materials; another is the Carnegie Institute of Technology. [fol. 446] Mr. Gregory: That is not a society.

The Witness: Another is the Mellon Institute, at Pittsburgh, Pennsylvania; another is the Engineering Department of the American Mining Congress; another is the Bureau of Mines of the United States Government.

By Mr. Gregory:

Q. Those are not societies, Mr. Puterbaugh?

A. No, but they are agencies or instrumentalities that are stating this subject.

Q. And all apparently agree on the same thing that these societies—

A. (Interrupting.) No. The point I am trying to bring out is that they do not agree. They are approaching one another but they are not in agreement, as these different books that have been quoted from here clearly show. Dr. Elwood S. Moore is one. He is dean of the School of Mines of the Pennsylvania State College.

Q. He is not a society. I know there are a lot of individuals.

A. That is what I am getting at. The American Standards of Testing Materials. That is another one.

Q. That is one of the two. But let it go; it will save time.

A. The point I am trying to bring out is this, that these [fol. 447] agencies, whether they be research institutions like the Carnegie Institute or the Mellon Institute or whether they be the American Society for Testing Materials or the organization of the Mining and Metallurgical Engineers, they are perfecting and changing their standards and recommending classifications from year to year.

Q. What changes are they making? Specify.

A. As to the analyses, the method of analyzing the coals and of determining their classification by chemical analyses. They have been gradually changing these from one method to another. Now, then, if we are going to base our classifications under the Bituminous Coal Act on the changing standards of various institutions outside of the Government who have no legal authority to establish standards that are binding upon the coal fraternity of the Nation, then we might find ourselves in the position of certain mines being under the Bituminous Coal Act one year and if the members of the American Society for Testing Materials happened to have its convention in December of this year and appointed a committee of people to come in and recommend a new basis of classifying coals, one mine or one group of mines might be under the supervision of the Bituminous Coal Commission one year and out from under them the next year, and if they would happen to change it again the next year they might get back in again.

[fol. 448] Q. Mr. Puterbaugh, are all those people members of the American Society for Testing Materials, this organization you have mentioned?

A. No, sir, I do not think so.

Q. They are all members of some society?

A. No. It is not probable that all the people that are studying this subject in the United States are members of any one organization. But what I am getting at is this. That the authority to legislate in respect to the coal mining business and the regulation of the coal industry rests in the Congress if it rests in any one. Certainly the intent of Congress would have to govern as to the classifications and as to the counties that were to come under the supervision of the Act, and not the fluctuating, shifting, changing standards and classifications established by different and sundry institutes and technical societies and chemists, even though their

modifications and changes from a scientific standpoint may be very much for the better, but in this practical matter of controlling improper competition in the coal mining industry it seems to me that the only authority that we can recognize and be governed by is the Congress of the United States and what it meant when it passed the Bituminous Coal Act of 1937.

By Mr. Riddle:

[fol. 449] Q. Mr. Puterbaugh, what would be the effect, in your judgment, a man of years of experience in the coal industry in this state and in Oklahoma, if the Commission should exempt three or four or five or six mines here that signed a contract with the mine workers, bituminous coal workers, what would be the effect on the miners and the public generally and the industry generally?

A. If one or more of these mines is exempted?

Q. Yes, sir.

A. The competition in the coal industry between all mines in District 14, which includes all mines in Arkansas and the smokeless mines in eastern Oklahoma, is very intense because of the overproduction that exists, since a large portion of the business that these mines formerly enjoyed has been taken over by natural gas and fuel oil.

Q. What would be the economic effect of it?

A. Therefore, to eliminate one company or to exempt one company from the regulation and control of the Bituminous Coal Act would tear down the whole price structure of all the mines in District 14 and have a demoralizing effect upon the mines in District 15, which market their coal in the same territory.

Q. Would it in effect, if some eight or ten of them got exemption, create a monopoly on the market in this state?

[fol. 450] A. No, I do not think it would create any monopoly.

Q. Wouldn't it very largely tend to create such?

A. It would be handcuffing nine men and taking the handcuffs off the tenth man and making him free to do what he wanted to do. And if the Bituminous Coal Board fixed a price of \$4.75 on the coal from the Spadra district and they exempted the Sunshine Anthracite Coal Company so that it could sell its coal at \$4.25 or \$4.50 or \$4, they would naturally get all of the business until such a time as the Bituminous Coal Board exempted our mines and all of

the rest of the operators, and then there would immediately be an attempt for exemption of the mines in the Paris district, where there are eight or ten companies operating, and in Sebastian County, Arkansas, where there are fifteen or twenty mines operating.

Mr. Riddle: That is all.

(A discussion was had off the record.)

Mr. Machugh: Are you resuming for the record now Mr. Examiner?

Examiner Newcomb: Yes. On the record now.

[fol. 451] L. N. PLEIN, resumed the stand and further testified as follows:

By Examiner Newcomb:

Q. Mr. Plein, I wish you would repeat for the record the exact status of the analyses of the American Society for Testing Materials.

A. You mean the classification?

Q. Being accepted or rejected by the membership of the American Society for Testing Materials, the chairman being Mr. A. C. Fieldner. It seems that Mr. Puterbaugh, a witness here, has inadvertently given the Examiner an impression which he did not intend to give, so I would like for you to be perfectly frank and clarify the record.

A. I testified that this classification had to be accepted by two-thirds of the technical committee. That is, a vote on it by mail. Then when the thing was passed up to the sectional committee, it again had to pass on it by a two-thirds vote by mail. I have nothing to show other than a variable conversation with Mr. Fieldner, the chairman of this committee, that everyone had accepted it except one individual. I would rather not mention the name or reason because it does not pertain to this case.

Q. It is not necessary, Mr. Plein. One more point. How many testing societies are there being used today and recognized?

[fol. 452] A. There is only one, the American Society for Testing Materials. Other people may have ideas on how coal may be classified. This has a national recognition.

Mr. Puterbaugh: Who are its members?

Mr. Gregory: That is already in the record in an exhibit.

Examiner Newcomb: It is in evidence as Exhibit No. 11. That is the committee appointed by the membership of this society.

The Witness: That is right.

By Mr. Riddle:

Q. That does not include all the chemists and classifying agencies in the United States on coal?

A. Oh, no.

Examiner Newcomb: Any further questions of this witness? Let the record show that Mr. Plein was recalled.

(Witness excused.)

[fol. 453] J. G. PUTERBAUGH, resumed the stand and further testified as follows:

By Mr. Riddle:

Q. You may proceed, Mr. Puterbaugh.

A. I want to quote from Bulletin No. 326 on the "Arkansas Coal Field," by Arthur J. Collier of the United States Geological Survey. On page 84 I read as follows: (Reading)

"A small amount of coal is crushed and reduced to fine powder, weighed, and then dried at a temperature somewhat above boiling point, which drives off the greater part of the moisture. It is again weighed and the difference in the two weights is taken as that of the water contained in the coal. The sample is then placed in a tightly covered crucible and heated over a Bunsen flame until all the gases are driven off and burned around the edges of the cover. It is then cooled and again weighed. The loss in weight being taken as the amount of volatile matter. The residue in the crucible now consists only of fixed carbon and ash. In the coking coals this residue will be fused into a solid mass but in others it remains as an incoherent powder. It is then heated over the flame in an uncovered crucible until all the carbon is burned and only ash remains, when it is again weighed and the difference between this weight and [fol. 454] the preceding is taken as the fixed carbon and the weight of the residue as ash.

By Mr. Gregory:

Q. May I ask what this has to do with this question or why it should be in the record, or what the purpose of it is?

A. I am willing to discontinue the reading, but the point I am getting at is this. That Mr. Collier in most of the works of the United States Geological Survey determined the rank of coal based on the proximate analyses. This new formula which has recently been made, just in September, or adopted by this society, provides that the rank shall be determined after the elimination of the moisture and the ash content. And it has probably been adopted now by representatives of the Bureau of Mines. But apparently up until the present time the representatives of the United States Geological Survey have determined rank on the basis of proximate analyses, while the attempt here is based entirely upon the dry and ash-free basis. If this coal is tested according to the standards that Mr. Collier has pursued in the determination of Arkansas coals, it falls below the requirements that would put it even in the semi-anthracite group. And I wish to repeat again that we construe that, when the Guffey Act or the Bituminous Coal Act [vol. 455] of 1937 provides that the words "bituminous coal" includes bituminous and semibituminous coal, that by the words "semibituminous" as they are used by the Congress covers semi-anthracite as defined by the American Society for Testing Materials.

I think that is all.

By Mr. Machugh:

Q. That document that you are quoting from was published in 1907?

A. Yes, but the analyses of the coal or the quality of the coal has not changed in that period.

By Examiner Newcomb:

Q. I take it that you have very little confidence in analyses?

A. Yes. I have confidence in them but I know that they are very variable, Mr. Examiner. I have divided a sample and sent it to two recognized laboratories and I got quite widely differing results from the different laboratories on the same sample. It isn't the exact science that mathematics is. You cannot nail it down; it is variable.

Q. Have you any suggestion as to what would be more

accurate as a guide to court and Congress if they were contemplating making a change?

A. I think this. That if Congress were starting out to write a new Act that it could amplify its language and if [fol. 456] it desired it could adopt this standard of this society, which is a very well recognized authority in these matters. But the point I am getting at is that it was not to be expected of our congressmen that they would have such a technical education, and I think we have to interpret what their intent was when they wrote this bill, what they included, and they got over the subject by saying "all counties in Arkansas are included." And they did not split hairs as to whether the carbon was eighty-one and a quarter or eighty-one and a half or whether it just got over the line of some engineering society's recommendations or whether it fell below them. It said "all counties in Arkansas." That was something that a common way-faring man could understand.

Q. Don't you believe that Congress took into consideration what semibituminous and subbituminous coal was?

A. I would like to ask some of the authorities here what they think Congress meant by "semibituminous."

Mr. Gregory: Mr. Examiner, we have had all kinds of interpretations here for the past hour as to what Congress thinks and what all these societies think. Can't we get along with this hearing?

The Witness: Mr. Examiner, I am just as anxious to get away as anyone else, but I think Mr. Gregory is a little [fol. 457] impatient. I do not know that I am doing him any special harm. I would like to say this. Was this map introduced that was presented here by Mr. Plein this morning?

Mr. Riddle: The Examiner asked that it be introduced and I suppose it went in.

The Witness: I would like to refer to that map, Mr. Examiner.

Mr. Gregory: Mr. Examiner, will this hearing be closed today?

Examiner Newcomb: Yes, sir. This hearing will be closed today.

The Witness: As Mr. Plein of the Commission testified at length, Mr. Marius R. Campbell is one of the recognized authorities on the coal fields of the United States, and he filed as Commission's Exhibit 13 a map of the United

States showing the location of the various coal fields on same. And in this map he has shown in different colors the quality and grade of the coal that is found in that particular locality. He has shown in the Arkansas fields, at the extreme east end, a small red spot about a quarter of an inch long, indicating that that is anthracite coal. I wanted to explain that to the Commission and to the Examiner. I wish to state that in my opinion that represents what is known as the Shinn Basin, which is shown somewhat more [fol. 458] plainly on the map which I introduced in evidence as Commission's Exhibit 18. That coal is a lot more anthracitic in character, a little harder, a little higher in fixed carbon and a little lower in volatile than the coal in Johnson County, where the Sunshine Spadra mine is located. And Mr. Campbell shows in a purple color the semibituminous coals, and the area that is colored purple here is much more extended than the red, which is very small, and this purple district covers the Hartshorne bed of coal, which includes the Spadra district. Now, then, this authority is about the only one that I have been able to find that refers first to anthracite and then as the next grade of coal semibituminous, and the word "semibituminous" is the descriptive word that is included in the definition of bituminous coal in the Bituminous Coal Act of 1937. And the weight of this evidence will be appreciated upon a review of what Mr. Plein said in respect to Mr. Campbell as an authority on the coals of the United States.

I think that is all.

Examiner Newcomb: Any questions of this witness?

Mr. Gregory: If the Examiner please, I would like to ask a few questions.

Examiner Newcomb: Proceed, Mr. Gregory.

[fol. 459] Cross-examination.

By Mr. Gregory:

Q. Mr. Puterbaugh, what is the area of the Shinn Basin; how long is it?

A. The Shinn Basin is about four miles long and about a mile and a quarter or a mile and a half wide.

Q. On the scale shown on that map, that anthracite basin shown by Mr. Campbell, allowing for the possible variation in the coloring and the running of the color, the basin of

anthracite coal is apparently from fifty to seventy-five miles long. Did you measure it?

A. No, sir, I have not measured it.

Q. Well, I measured it.

A. If you want to take the time, I think we might get at that by another method. May I see that map, Commission's Exhibit 18?

Q. Well, I do not care, but I am just asking you a question. You can answer yes or no, what you think of it.

A. Yes, sir. I will have to answer "no."

Mr. Gregory: All right, that is all.

By Mr. Machugh:

Q. Mr. Puterbaugh, will you designate the two maps when you speak of them, please?

Examiner Newcomb: Any other questions, Mr. Gregory? [fol. 460] Mr. Gregory: Yes, sir, please.

By Mr. Gregory:

Q. Mr. Puterbaugh, the matter of the wage contract with the miners was again brought up. Does the wage contract specify the words "bituminous coal" in the contract?

A. No, sir. I do not think it is in the contract.

Q. Is the word "anthracite" in the contract?

A. Not that I know of. It is well recognized and it is a custom that the bituminous wage contract comes up one year and the anthracite wage contract comes up another year.

Q. There is not any anthracite wage contract out here?

A. I am talking about the Pennsylvania anthracite.

Q. That hasn't anything to do with this that we are talking about, the wage contract which has been repeatedly referred to in the testimony as the bituminous wage contract. I am just making it clear that it is not a bituminous wage contract.

A. There is only one wage contract in the United States that I know of outside of the Pennsylvania anthracite. That is known as the anthracite contract; the other is known as the bituminous contract throughout the country.

[fol. 461] Q. You mentioned that the percentage of slack coal in this Spadra coal was about twenty-three percent of the production?

A. Yes, sir.

Q. Doesn't that include the coal from the breakers? Is that from the mines?

A. That is the coal as shipped.

Q. That includes the breakage in the breaker?

A. Yes, sir.

Q. All of the coal is put through breakers, isn't it, all of the Spadra coal?

A. All above about four or five inches.

Q. There is no lump coal or any large coal shipped from Spadra?

A. No, sir, not to speak of.

Q. Now, you mentioned here your interpretation of what Congress meant in setting up the Guffey bill, that Congress so specified in the bill what bituminous coal was by taking in the entire state of Arkansas. Now, the bill speaks for itself and I don't think any interpretation is necessary. But do you believe from what the bill says in the paragraph that you read, that applies to bituminous coal? Is that your understanding of it?

A. My interpretation of that is that it applies to all the coal in all the counties mentioned in the annex to the [fol. 462] bill.

Q. It says, "This bill to cover bituminous coal." Does it mean bituminous coal or does it not?

A. It describes the word "bituminous." It says very definitely what it means by "bituminous."

Q. It has specified bituminous coal; does it mean bituminous coal, what it says?

A. Let's read the Act.

Q. You have already read it.

A. Then why do you ask me that? (Reading) "The term 'bituminous coal' includes all bituminous, semibituminous, and subbituminous coal and shall exclude lignite."

Q. It did not exempt anthracite or anything else.

A. If exempted anthracite by not including the counties where anthracite is produced.

Q. It did not mention anthracite or semi-anthracite or anything else?

A. No, sir.

Q. It just specified it was a bill to cover bituminous coal?

A. Yes, sir. And I think our main job is to find out what Congress meant when it wrote the bill.

Q. The bill is quite clear as I see it. I think they made it clear? In these counties that are mentioned in Arkansas

[fol. 463] there are a lot of other things besides coal produced, bituminous coal and other kinds of coal, cotton, peaches, and everything else. Do you think it is necessary for them to specify in this bill that those things are all eliminated, or do you think they should be mentioned by name in this bill?

A. No, sir. It said coal. They are not trying to regulate anything in this bill but coal.

Q. "Bituminous coal" is what the bill says.

A. As described in the Act and as further described by the counties.

Q. Do you feel that Congress is a legislative body or a fact-finding body?

A. I think it is a legislative body.

Q. They don't attempt to decide before they pass a bill whether the coal falls into certain classifications, do they?

A. I think they know what they thought they were doing.

Q. You do not think that every member of Congress has made a study of coal or knows the grades or the difference between bituminous or semibituminous or lignite, do you?

A. No, I do not.

Q. You testified awhile ago in response to one of Mr. [fol. 464] Riddle's questions that you had been engaged in this business for forty-two years, that you had been in the Fernwood mine for twenty years. During that time did you ever sell any coal out of the Spadra coal field as bituminous coal?

A. We have sold most of it as Arkansas anthracite, just along with the rest of the crowd. We have sold a good deal of it as Fernwood coal. Most of it in recent years has been sold as Fernwood coal.

Q. You were probably the first of all the modern companies in that field, weren't you, of the companies that are in that business today? Wasn't the McAlester Fuel Company the first of all the companies to sell that coal?

A. No, there were many companies before the McAlester Coal Company was organized.

Q. Not companies that are in business now or have been for the past two years?

A. Well, there have been many changes but some of them are still there.

Q. You testified in response to one of Mr. Riddle's questions that the selling of this coal as Arkansas anthracite was a marketing proposition and not the truth. Do you think

now that that is the truth or did you think at the time you [fol. 465] sold it for anthracite that it was the truth?

Mr. Riddle: I beg your pardon. I object to the question. He did not say "not the truth."

Mr. Gregory: You may refer to the record.

Mr. Riddle: The question was if it was not sold merely as a marketing proposition.

Examiner Newcomb: We will have the record read back.

Mr. Riddle: I will withdraw the objection. Let him answer.

A. I said that the original producer started the coal out under the trade name of Arkansas anthracite and that each succeeding producer adopted that name more or less in their advertising and it has clung to it more or less up to the present time.

(A discussion was had off the record.)

Examiner Newcomb: Let's proceed.

The Witness: I might state this in speaking of trade customs and advertising, that all the Paris coal is sold as semi-anthracite.

Mr. Gregory: That hasn't anything to do with this.

The Witness: And all Sebastian coal and eastern Oklahoma coal is sold either as semi-anthracite or smokeless, and those are the classifications that have been recognized out here for forty or fifty years, from a marketing stand-[fol. 466] point. And the mines in Spadra have claimed a little less smoke and a little less volatile than the mines in Sebastian County, in the extreme western part of the state, which sold their coal as semi-anthracite.

Mr. Gregory: We have sold a lot of coal down here that we did not sell as semi-anthracite, over a long period of years, that we did not sell as semi-anthracite.

Mr. Riddle: I move to strike out the statement of counsel.

Mr. Gregory: Why not strike out the statement of the witness?

Examiner Newcomb: Strike both the voluntary statement of the witness and also of the attorney.

Mr. Riddle: I object to striking out the answer of the witness.

Examiner Newcomb: It was not an answer. He did not ask him a question; he just volunteered it.

Mr. Riddle: He had asked him just before that.

Examiner Newcomb: He had answered that question before.

The Witness: I wanted the statement in the record that the coal from the Paris and Sebastian County fields was generally sold to the trade as semi-anthracite. Is that permissible?

Examiner Newcomb: Is that in response to some question? [fol. 467] Mr. Gregory: No, not at all.

The Witness: No. I am speaking for the operators in District 14 and I have not been depending entirely on questions. I just wanted to get it clear.

Examiner Newcomb: Mr. Puterbaugh, that is really argumentative and at the close of this case, when you conclude your statement you may state your views.

The Witness: Yes, sir.

Examiner Newcomb: When both sides have concluded their testimony I will ask if there is any further statement to be made.

By Mr. Gregory:

Q. Mr. Puterbaugh, when did you decide that this coal was not Arkansas anthracite? Was that after the passage of the Guffey-Vinson Act?

A. It came about several years ago when we were trying to introduce the coal into St. Louis. The Fair Trade Practice Association up there brought up the subject and obtained a ruling from the Bureau of Mines and the United States Geological Survey that offering this coal as anthracite was an unfair trade practice. That started it. And then I think the question came up again as to whether or not these mines were under the NRA and it was again ruled there that they were not anthracite and that they were under the NRA [fol. 468] or bituminous code, which did not include Pennsylvania anthracite.

Q. You are still selling the coal as Arkansas anthracite?

A. Yes, sir.

Q. But you do not believe that it is?

A. No, sir.

Mr. Gregory: That is all.

Mr. Machugh: If the Examiner please, I would like to ask Mr. Puterbaugh some questions.

Examiner Newcomb: Proceed, Mr. Machugh.

By Mr. Machugh:

Q. Mr. Puterbaugh, two exhibits have been introduced since you have been on the stand—Commission's Exhibit 17 and Commission's Exhibit 18. I would like to call your attention to the fact that my examination fails to reveal any date on either one. Are you able to amplify Commission's Exhibit 17? That is the article on coal from Campbell's classification.

A. I do not think I have the book here to give you that information.

Q. If you haven't the date, then let it go. Commission's Exhibit 18 is a map of the coal fields of Arkansas. Do you know when that was prepared?

A. No, sir, but the map of Arkansas has not changed recently.

[fol. 469] Q. Does that represent the situation today, so far as you know?

A. Yes, sir.

Q. What is the name of your company that operates in the Spadra field?

A. The Fernwood Coal & Mining Company.

Q. Are you president of that company?

A. Yes, sir.

Q. How long have you occupied that position?

A. The name of the operating company has changed within the last two years. I am also president of the McAlester Fuel Company, which owns the property, and have been since we acquired it some six or seven years ago.

Q. Is that the Fernwood Anthracite Coal Company?

A. No, sir. It is the McAlester Fuel Company. That is the company that owns the property, the Fernwood mine.

Q. Who is the Fernwood Anthracite Coal Company?

A. I do not know. Our company is the Fernwood Coal Mining Company.

Q. That is not your company?

A. No, sir.

Q. What is the tonnage of the Fernwood Coal Company, the annual tonnage for 1936?

A. It was about thirty-five thousand tons.

[fol. 476] Q. Where was that sold?

A. It was sold in eastern Kansas and Nebraska, some in the Dakotas, some in Minneapolis and St. Paul, some in St. Joseph, Missouri, a very little in Texas and practically none in Arkansas.

Q. What percentage of it went outside of Arkansas?

A. I would say ninety-nine percent.

Q. Is that correct, also, in your opinion of the Spadra coal?

A. Yes, sir.

Q. You sell outside of the state of Arkansas?

A. The state of Arkansas is abundantly supplied with natural gas and nearly all domestic consumers use natural gas in Arkansas.

Q. To what class of consumer is your coal sold?

A. It is sold to retail coal dealers, who distribute it to householders for heating stoves and furnaces primarily.

Q. That is domestic consumption and not industrial?

A. That is right. Practically none to the industrial consumer.

Q. Are you able to name any representative consumers of your company?

A. No, sir. We don't keep track of the retail consumers.

[fol. 471] Q. You have already stated the effect of granting an exemption in this matter, the general effect. May I ask you what will be the effect upon the consumer if the exemption sought by the Sunshine Anthracite Coal Company in these proceedings is granted?

A. I doubt if it would have any appreciable effect on the consumer. I assume that the motive that prompts the application for exemption is to obtain a freedom in the matter of making prices and sales that the other producers in the field will not have, and that would make it possible for the exempted company or companies to quote lower prices to the dealers if they desired to. It is entirely problematical whether the dealers would absorb the difference as a profit or whether it would be passed on to the consumer trade. Further, the assumption apparently on the part of the applicant is that the Bituminous Coal Commission will establish a price too high to enable it to compete and market as much coal as it would like to market, and I assume further that it may be the thought that if certain mines are exempted and privileged to market their coal at lower prices than the other mines in the group are asking, that they would get a larger share of the available business on that class of coal, and being able to operate their mines a greater number of days per year, it would operate to lower their cost of production somewhat. That is the only [fol. 472] effect that I could indicate.

Q. Have you anything further to say as to the possible effect on the consumer of the granting of this exemption?

A. No, sir.

Mr. Machugh: Thank you, Mr. Puterbaugh. That is all.

By Mr. Gregory:

Q. Mr. Puterbaugh, may I ask you one more question along that line?

A. Yes, sir.

Q. Have you been a proponent of this coal legislation since its inception?

A. No, sir. As a representative of the mines in Arkansas and Oklahoma I went to Washington and appeared before the Senate Interstate Commerce Committee on the first Guffey bill and I am on record as very much opposing the original Guffey act. When the second Guffey act was introduced into Congress I took no action pro or con.

Q. Isn't it your understanding that the avowed purpose of this Guffey bill was to avoid the cutting of the miners' wages and the prohibition of the sale of coal below the cost of production? Isn't that the avowed purpose of the Act?

A. Yes, sir, to stabilize the marketing of coal.

[fol. 473] Q. Do you have any fear whatever that we will sell our coal below the cost of production at this mine or that we will not pay the miners the regular wage scale?

A. I am sure that you would have to pay the miners the regular wage scale if you operated with union labor there, but all of the operators in Arkansas are very definitely alarmed and afraid that you will not observe the prices because you have recently quoted the trade in the north a price about seventy-five cents below what the rest of us are asking and you have told the trade that you were going to operate outside of the Bituminous Coal Act and that you were going to be able to produce coal at a very low cost and would contract with them for the season at four dollars per ton.

Q. You are making a statement there that you don't know anything about. In fact, I haven't made any such statement. We have not said that and that hasn't anything to do with the question. Do you fear that we will sell the coal below the cost of production and thereby defeat the purpose of the Guffey bill?

A. I would assume that you would not sell it below what you believe will be your cost of production. You might sell it below the price established by the Bituminous Coal Commission.

Q. Or what might be your cost of production?

[fol. 474] A. That would not be material.

Q. All of this argument the past three days, isn't it really due to your fear that we will sell the coal below the price that you want fixed?

A. It is due to the thought that if you are exempted and the rest of the mines are not exempted that we will have to observe as a minimum the price which the Bituminous Coal Commission will presently announce as our minimum, and if you are outside and exempted on the ground that you are mining anthracite coal and are not subject, that you can cut the price twenty-five cents and take every customer we have got.

Q. That is really your object in trying to bring us in under the Bituminous Coal Act?

A. Yes, sir, it is. It is for equal opportunity for all of the mines in District 14.

Mr. Gregory: That is all.

By Mr. Waldron:

Q. I want to ask you some questions in line with the questions that counsel has just asked you. If it was not some decided advantage that they might obtain by virtue of the fact that they were excluded from this Act, do you think that they would be coming in here claiming for exemption?

A. I cannot figure out any other motive for all of this [fol. 475] trouble.

Q. Then I want to ask you about this mention you made of the Fair Trade Practices Association. You said there was a question raised several years ago by the Fair Trade Practices Association?

A. Yes, sir.

Q. Was there a hearing held?

A. No, sir. The company that was offering our coal in St. Louis, where it has never been able to gain much of a foothold, evidently some of the retail coal dealers handling Illinois coal and other coals in St. Louis took it up with the Association called the Fair Trade Practices Associa-

tion and got them to rule that this coal was not anthracite, and I think they took it up with the Bureau of Mines and maybe the United States Geological Survey and got a ruling from them that it was not anthracite coal.

Q. You also stated that you were included within the provisions of the NRA Act?

A. Yes, sir.

Q. Who included you, the bituminous coal section of the NRA?

A. I just don't know the name of the particular group. We were included in the bituminous coal code that was adopted under the NRA.

[fol. 476] Q. Was there any hearing held on that?

A. On this particular subject? I think not.

Q. When you were brought in under the bituminous coal code?

A. Yes, sir.

Q. Was there any hearing or any record made of that?

A. I don't think so. So far as I know, all of the companies yielded the point and accepted the code and performed under it.

Q. All the companies in Arkansas accepted the bituminous coal code under the NRA?

A. Yes, sir.

Q. And operated under the provisions set up by the code?

A. Yes, sir.

Q. As to prices and so forth?

A. Yes, sir.

Mr. Waldron: That is all.

By Mr. Gregory:

Q. Mr. Puterbaugh, the NRA was not a coal act, was it? Didn't they take into account groceries and garages and dry cleaners and everything under the NRA?

A. Yes, sir.

Q. We all accepted it. There was no question of coal classification?

[fol. 477] A. It did not apply to anthracite coal. I do not think they ever established a code for Pennsylvania anthracite coal, but they did establish a code for all bituminous coal.

Q. You know that we did not own the Sunshine mine at that time or at least were not parties to it?

A. I don't know just when you became interested in that mine.

Mr. Gregory: That is all.

Examiner Newcomb: Do you have anything further, Mr. Puterbaugh?

The Witness: Not a thing.

Examiner Newcomb: Thank you, Mr. Puterbaugh.

(Witness excused.)

R. A. YOUNG, President of the R. A. Young & Son Coal Company, Fort Smith, Arkansas, was duly sworn and testified as follows:

Direct examination.

By Mr. Riddle:

Q: State your name.

A. My name is R. A. Young. I am a coal operator, operating mines at Jenny Lind.

Q. Where do you reside, Mr. Young?

A. Fort Smith, Arkansas.

[fel. 478] Q. How long have you lived here?

A. I have lived in the county fifty-five years.

Q. Have you been engaged in the coal business during any part of that time?

A. A little better than forty years.

Q. Both mining and marketing?

A. More in the operating end of it.

Q. Have you held any official position in this state?

A. Well, I was one time state mine inspector and I am a member of the state mining board at the present time.

Q. How long were you such mine inspector?

A. Two years.

Q. Are you acquainted with all the coal mines in this state?

A. Yes, sir.

Q. From your experience of forty years in mining coal and as an operator and also as state mine inspector, did you find in your various rounds visiting mines any mine in this state that had anthracite coal?

A. No, sir.

Q. Did you find any that had semi-anthracite coal?

A. I don't think so. So far as my knowledge goes, it is bituminous coal.

[fol. 479] Q. Have you had any information from any official sources as to the character of the coals in Arkansas?

A. When I heard this question was up I was in Washington. I went around to the Bureau of Mines and I told them about the controversy. I said, "I want to talk to the man in charge of analyses." They directed me to a man by the name of Snider. I asked him if he was familiar with the analyses of the coals in Arkansas, and he said he was. I asked him what it was and he said, "bituminous."

Q. Did you ask him specifically if there was any anthracite—

A. (Interrupting) Yes, sir. He said there was not.

Q. (Continuing) Either anthracite or what is called semi-anthracite coal?

A. He called it bituminous coal.

Q. Did you have any conversation with any other governmental agency there with respect to coal in Arkansas?

A. I went to the Geological Survey and hunted up Mr. Hendricks, whom I knew was familiar with this coal field, having spent about two years making a survey, and he stated positively it was not anthracite.

Q. And that is your opinion?

A. Yes, sir.

Mr. Riddle: That is all.

[fol. 480] Examiner Newcomb: Any questions?

Mr. Gregory: Yes, if the Examiner please.

Examiner Newcomb: Proceed, Mr. Gregory.

Cross-examination.

By Mr. Gregory:

Q. You did not get any written statement or affidavits or publications or anything?

A. I have got some publications.

Q. Nothing that has not already been introduced in evidence.

A. He gave me the publications that his opinion was based on.

Q. You have a railroad over at Russellville, don't you?

A. No, sir. The B. & R. Railroad has a railroad over there.

Q. Isn't that owned or controlled or associated with your companies?

A. That is Mr. Puterbaugh's property.

Q. You don't have anything to do with the operation or management or anything of that railroad?

A. In a way.

Q. Do you burn any of your own coal on that railroad?

A. I think they use a gasoline motor.

[fol. 481] Q. Don't use any coal at all?

A. They did use coal one time, I think. I don't know what kind of coal they used.

Q. When they burned coal did they burn coal from your own mine?

A. I really don't know.

Q. Did they buy coal from Denning or some other coal to burn in that locomotive?

A. The only connection I have on that property is they consult me about labor matters or maybe some other matter.

Mr. Gregory: That is all.

Redirect examination.

By Mr. Riddle:

Q. Mr. Young, you contacted Mr. T. A. Hendricks, you say?

A. Yes, sir.

Q. He is one of the members of this technical committee of coal classification of the American Society for Testing Materials, is he not?

A. I really do not know. This document says, "T. A. Hendricks, Assistant Geologist, U. S. Geological Survey, Washington, D. C." That is his name.

Q. That is the same man that you had the conversation with?

[fol. 482] A. Yes, sir.

Q. He is one of the sectional committee for the classification of coal under the American Society for Testing Materials?

A. According to that document.

Q. Have you a map of the fields here?

A. This is a map gotten out by the Southwestern Coal Company, by Mr. Welch, a mining and civil engineer.

The Examiner asked me to get one to show the locations of the mines. It is just a sales proposition.

Mr. Machugh: That has been introduced in evidence as Commission's Exhibit 18.

Examiner Newcomb: Does Consumers' Counsel have any questions?

By Mr. Machugh:

Q. Mr. Young, may I ask you to relate your present position.

A. President of the R. A. Young & Son Coal Company.

Q. Where is that located, please?

A. Jenny Lind, about ten miles south of here.

Q. Are you also a member of the state mining board?

A. Yes, sir.

Q. At the present time?

A. Yes, sir.

[fol. 483] Q. What is the annual tonnage of your mine, last year?

A. Last year, in 1936, our tonnage was 167,000 tons. About twice as much as anybody else in the state or in the district.

Q. How much of that tonnage was shipped out of Arkansas?

A. Oh, I would say ninety-eight percent.

Q. To what class of consumers?

A. Most of it was for railroad use.

Q. Are you able to name two or three typical consumers of your company?

A. At the present or during last year?

Q. During last year. At the present time or last year.

A. Well, last year all of our tonnage went to the Western Coal & Mining Company, which is a subsidiary of the Missouri Pacific Railroad. All of that, I think, which was 160,000 tons, went to the railroad, and about 7,000 tons went to the consuming public.

Q. What is the address of the railroad consumer?

A. St. Louis.

Q. St. Louis, Missouri?

A. Yes, sir.

Mr. Puterbaugh: Mr. Examiner, I would like to inform [fol. 484] counsel for the Consumers that Mr. Young is not

a producer in the Spadra field; he is producing at Jenny Lind, over in the western part of the state.

Mr. Machugh: That is in the record. Thank you, Mr. Puterbaugh, for calling that to my attention.

By Mr. Machugh:

Q. What in your opinion will be the effect of granting the exemption sought by the Sunshine Coal Company in this proceeding?

A. It will be a very disturbing element, I think.

Q. For what reason?

A. Well, it will disturb the market condition for all of our coals.

Q. In what manner?

A. Well, it would break down the price structure because the other operators would chisel on each other. They would have to, in my opinion, to compete with a mine mechanically equipped such as this mine of the Sunshine Coal Company is now attempting to put in operation.

Q. Have you anything further to say with respect to the general effect of granting the exemption? Have you anything to say with respect to the effect upon the consumers of coal if this exemption is granted?

A. That is hard to tell.

Q. You have nothing to say on that? You do not feel [fol. 485] qualified to express an opinion on that?

A. I don't know what will happen.

Mr. Machugh: Thank you, Mr. Young. That is all.

Examiner Newcomb: Any further questions of Mr. Young?

Mr. Gregory: That is all.

Mr. Riddle: That is all.

(Witness excused.)

COLLOQUY

Examiner Newcomb: Are there any interested parties here who wish to make a statement before the hearing is concluded?

Mr. Gregory: I understand the testimony is all in?

Examiner Newcomb: I do not know. I am just asking now if there are any other interested parties that desire to make a statement before the hearing is concluded.

Mr. Patterson: At this time, if the Examiner please, I would like for Mr. Gregory to make a short statement.

Examiner Newcomb: Before he makes that statement, Mr. Howard and yourself have stated that you have certain exhibits to offer and that you will have them in my hands within a week. I do not believe that the transcript of this proceeding will be in Washington for at least ten days. So we will change the time previously stated and give you ten days because I cannot consider the case and begin to make findings before I have the completed record before me and all the exhibits.

[fol. 486] Mr. Patterson: Thank you.

Mr. Machugh: Mr. Examiner, may I inquire before the hearing is closed if the arrangement about taking the samples, which Mr. Plein discussed this morning, has that been settled?

Examiner Newcomb: I understand that Mr. Gregory is going to include that in his statement that he is going to make now for the record.

Mr. Gregory: We have made the arrangements for taking the samples.

Examiner Newcomb: Mr. Gregory, will you state for the record and have it concurred in by Mr. Denman that you have agreed when to take the samples and so forth?

Mr. Gregory: It is agreed between Mr. Denman and ourselves that Mr. Denman will accompany our Mr. Schull to take the necessary samples under the conditions specified by Mr. Plein, and that those samples will be furnished under those conditions to the laboratories and to us as specified.

Examiner Newcomb: Have you agreed upon a time?

Mr. Gregory: Tomorrow morning.

Mr. Denman: I concur in the statement, except we agreed on Friday morning.

Examiner Newcomb: Let the record so show. You may proceed, Mr. Gregory.

[fol. 487] Mr. Gregory: Mr. Examiner, I just want to very briefly bring out the fact that we are not asking for exemption in an effort to avoid the payment of the tax. As evidence of that I want to make a statement that we and our allied and subsidiary and associated companies will probably pay under the Guffey-Vinson act approximately twenty-five times the tax paid by the entire field here. So that is not our motive. The avowed purpose of the Guffey

bill was to prevent coal operators from selling coal below the cost of production and to prevent them from cutting the miners' wages in order to sell coal at ruinous prices. It is not our intention to sell coal at a loss. We expect to sell it at a profit and a very substantial profit. We expect to pay the established miners' wages and to go along as we always have.

Mr. Riddle: Is this statement going in the record?

Mr. Gregory: Yes, sir.

Examiner Newcomb: Mr. Riddle, they have a privilege to make their concluding statement, the same as Mr. Puterbaugh. Mr. Puterbaugh said he desired to make one. You may make one at the conclusion of the case.

Mr. Riddle: All right.

Mr. Gregory: We simply feel that we have at least a semi-anthracite coal and on that basis we have made our case.

[fol. 488] Examiner Newcomb: Any other closing statement?

Mr. Patterson: Mr. Examiner, I desire at this time, by way of supplement to certain protests made by Mr. Howard on Monday, and on behalf of the petitioner, to at this time enter a further protest to the position taken by counsel Riddle of the Commission throughout this hearing, in that he has personally taken a position adverse to that of the petitioner by putting upon the witness stand each of the witnesses. As we take it, as such counsel his position must be absolutely impartial. In other words, if he has reason to believe or has any information that this coal here might be anthracite or semi-anthracite, it is our position that it is then his duty to bring on testimony or make inquiry in an effort to show that fact. It is our position from the record; and the record will show it, that he has failed to do that, and that his position throughout this hearing has been antagonistic to that position. We want that statement put into the record.

Mr. Riddle: In reply to that statement I want to say that I was sent out here to cooperate with the District Board as part of the National Bituminous Coal Commission set up at the time; that I came here along with my associate, Mr. Waldron, to ascertain whether or not any of this coal was entitled to any exemption and whether or not they were to [fol. 489] get rid of the tax through any false pretenses or misnomers by name, and so far as I am concerned and on behalf of myself—Mr. Waldron may speak for himself—I

have no apologies whatever to make. I have associated with this District Board and I have tried to put the evidence in that they desired to be put in on the part of the Commission. I was not sent here to be a mutual aid society for the petitioners. It was up to them to introduce and prove by a preponderance of the evidence under the general rules of evidence their case that they were clearly entitled to exemption from the operation of the National Bituminous Coal Act.

Examiner Newcomb: Any further statement or closing arguments?

Mr. Patterson: I would like to make a statement not connected with this, if the Examiner please. The hearing is closed, I understand. I wanted to ask if any time lately had been set by the Examiner giving the petitioners the Diamond Anthracite Company and the D. A. McKinney Coal Company to file with the Commission their petitions for exemption. Leave was obtained to file them but I do not know whether you fixed the time or not.

Examiner Newcomb: Their petitions will not be considered until they have filed them. You appreciate, Mr. Patterson, that the Commission or the Examiner could not consider an application for exemption until the petition and the requirements necessary under Order No. 28 have been received by the Commission. I want that understood, that we could not consider any case until the petition is filed.

Mr. Patterson: I assure the Examiner that the petitions will be filed prior to the time the evidence is transcribed.

Examiner Newcomb: Anything further now?

Mr. Puterbaugh: Speaking for the operators in District 14, am I privileged to make a few closing remarks?

Examiner Newcomb: Certainly. You may enjoy the same privilege that every one else has.

Mr. Puterbaugh: I want to say this, that it has not been a pleasant task for us to oppose our neighbor's application here. We have been reluctant to do it. But it is a well known fact that the coal mining industry in Arkansas, as well as throughout the country, has been in a deplorable condition. There have been many failures and bankruptcies and missed pay rolls. It finally came to be an almost unanimous thought that something similar to the Bituminous Coal Act should be tried as a means of stabilizing this business and civilizing it and taking out of it the "dog eat dog"

[fol. 491] competition that was destructive of many operations and of profits and was really resulting in forcing producers to take the crop coal, the cheap coal, and abandon mines that were not yet worked out. The history of the Spadra coal field for the past ten years is a very tragic one. It is an excellent grade of domestic coal and is a valuable resource to the state and to the country, and yet those that have been engaged in it because of price cutting below the cost of production and below any profit, profitable price, has kept the field disorganized and unprofitable. The particular mine that has applied for exemption here, the Sunshine mine, is an old mine. It was purchased a few years ago by Mr. Earl Johnson and after he had done some improving I understand that the Binkley Coal Company of Chicago became interested with him financially and they started in to mine a new system of mining, such as has been in effect over in Paris, and Mr. Johnson stated frankly to me and to others that he could not go along with the rest of the operators in the field, that he was going to produce coal very cheaply and that he was going to produce it in volume and run his own business, and he demoralized the price in that field for one or two seasons. I think last season the mine was closed down almost completely. Recently the Binkley Coal Company has become interested and they [fol. 492] have driven a slope down in place of a shaft and are putting in a new system of mining, conveyor system, which they believe will enable them to produce the coal at a very much lower cost than the system in effect today in the other nine mines in the field. Their system is as yet untried. They hope and believe that it will enable them to produce coal cheaper. If it is a matter of free and open competition and there is to be no stabilization, no regulation, then under the old rules we could all have a right to name any price that we want, and if one company can eliminate all the others or any of the others that would be the competitive idea. But apparently the Congress of the United States decided that that was not good policy for labor, not good policy for industry, and the Guffey bill was passed so that a neutral mind would look at the situation and see what the costs were and say, "Now, here. All of you folks have been unable to agree and get along. We are going to tell you how much you can get and how little you can get." That is the policy. That seems to be the policy of our Government and of all the operators except the three that

have spoken here. We feel that that will be a great advance and very civilizing if it can be worked out successfully. And our reason for appearing here and for questioning this technical claim of exemption is (that we feel in the [fol. 493] spirit of fair play as between competitors and neighbors in the field that if any of us are going to be tied, if any of us are going to be regulated by law, then we should all be regulated by law; and if the law is deficient, if the law doesn't include this particular class of coal, then we should all be exempted and revert on equal opportunity and equal basis to the competitive idea.

Examiner Newcomb: Anything further? The Commission, through the Examiner, wishes to express their gratitude for the splendid cooperation of everyone. The hearing is adjourned.

(Thereupon, at 3:55 p. m., October 6, 1937, the hearing in the above-entitled matter was adjourned.)

[fol. a]

[Caption omitted]

[fol. 1] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE EIGHTH CIRCUIT, OCTOBER TERM, 1938

No. 421, Orig.

SUNSHINE ANTHRACITE COAL COMPANY, Petitioner,

vs.

NATIONAL BITUMINOUS COAL COMMISSION, Respondent

PETITION TO REVIEW ORDER OF NATIONAL BITUMINOUS COAL
COMMISSION—Filed October 10, 1938

Comes now the Sunshine Anthracite Coal Company, petitioner herein, and petitions this Honorable Court to review and set aside the order of the National Bituminous Coal Commission made, entered and issued by the National Bituminous Coal Commission on the 31st day of August, 1933, and respectfully represents as follows:

1. That petitioner, Sunshine Anthracite Coal Company, is a corporation duly organized and existing under and by virtue of the laws of the State of Arkansas, and is now and for several years last past has been engaged in the business of mining Arkansas anthracite coal at its mine in John-

[fol. 2] son County in the State of Arkansas, and that its principal place of business is located in Clarksville, Arkansas; that petitioner is not a member of the Bituminous Coal Code, promulgated by the Commission on June 21, 1937, pursuant to the National Bituminous Coal Act of 1937, and has not subscribed to nor accepted the provisions of said code.

2. The respondent, National Bituminous Coal Commission, hereinafter referred to as the Commission, is an agency of the United States in the Department of the Interior, created and existing by virtue of the Bituminous Coal Act of 1937 (Public No. 48—75th Congress, First Session, Ch. 127), and has its offices in the Walker Building, 734 Fifteenth Street, N. W., in the City of Washington, District of Columbia.

3. This is a petition to review and set aside an order entered and issued by said Commission on the 31st day of August, 1938, notice of the entry of said order having been mailed to your petitioner on the — day of September, 1938, and said notice received by your petitioner on the — day of —, 1938, a copy of which said order is attached hereto, marked "Exhibit A," and made a part hereof, and this petition for review is filed under the provisions of Section 6 (b) of the Bituminous Coal Act of 1937 aforesaid.

4. That your petitioner herein, on or about August 31, 1937, filed with the said National Bituminous Coal Commission its request for exemption from the operation of said Bituminous Coal Act of 1937 for the reason that the coal mined and produced by your petitioner was not bituminous coal and was not subject to the provisions of the Bituminous [fol. 3] Coal Act of 1937, as will more fully appear in the transcript hereafter to be filed; that thereafter such proceedings were had that a so-called hearing was held at Fort Smith, Arkansas, on October 4th, 5th and 6th in the year 1937, before an examiner for the said respondent herein, the said petition of your petitioner herein being in conjunction with a general hearing on the question of the status of coals in Arkansas and not upon the separate petition of petitioner herein, and that thereafter, while the request of your petitioner for exemption from the Bituminous Coal Act of 1937 was pending before said National Bituminous Coal Commission, on January 21, 1937, petitioner

herein filed with said Commission its motion to dismiss said request for exemption, a copy of which said motion to dismiss is attached hereto, made a part hereof, and marked "Exhibit B"; that thereafter, and while said request was still pending before the respondent herein, such proceedings were had and held that on the 3rd day of February, 1938, an order was entered by said respondent herein denying petitioner's said motion to dismiss, a copy of which said order so entered by said National Bituminous Coal Commission is attached hereto, marked "Exhibit C," and made a part hereof; that thereafter, on January 21, 1938, an examiner's report was filed herein, said report, however, not being available to your petitioner until on or about the 24th day of January, 1938; that afterwards, to wit, on or about the 28th day of April, 1938, there was filed as part of the records in said cause a "Proposed Report of the Commission," a copy of which said proposed report is attached hereto, marked "Exhibit D," and made a part hereof; that thereafter petitioner filed herein its exceptions to the "Proposed Report of the Commission," a copy of which said exceptions being attached hereto, made a part hereof, and [fol. 4] for the purpose of identification is marked "Exhibit E"; that such further proceedings were had and held that thereafter, to wit, on the 31st day of August, 1938, there was entered in said cause an order overruling petitioner's exemption from the provisions of the Bituminous Coal Act denying petitioner's petition for exemption, copy of which said order of respondent is attached hereto, marked "Exhibit A," and made a part hereof.

5. Your petitioner believing itself aggrieved by the aforesaid order of the Commission, and considering the same unduly prejudicial to your petitioner, and your petitioner being without remedy in the premises except in this court as by statute in such cases made and provided, hereby petitions for review of said order of the Commission by this Honorable Court, and assigns the following errors of the Commission:

The Commission erred:

1. In assuming jurisdiction of petitioner's petition for exceptions to the "Proposed Report of Commission" and of 1937. The National Bituminous Coal Commission was without jurisdiction of the subject matter.

2. In denying and overruling petitioner's motion to dismiss said request for exemption.

3. In assuming to exercise any further jurisdiction over said petition for exemption and entering its order thereon denying said request for exemption.

4. The findings and orders of said Commission are contrary to law.

5. The findings and orders of said Commission are against the weight of the evidence.

[fol. 5] 6. The findings and orders of said Commission are without substantial evidence to support them.

Wherefore, your petitioner prays:

1. That this petition be received and filed.

2. That the Commission be required by order of this Court to certify and file in this Honorable Court a transcript of the complete record on which the order complained of herein was entered.

3. That upon final hearing, as provided by statute, this Honorable Court enter an order permanently setting aside the aforesaid order of the respondent herein.

4. That your petitioner have such other and further relief in the premises as to this Honorable Court may seem just and proper.

Sunshine Anthracite Coal Company, by George O. Patterson, Jr., Henry Adamson, Its Attorneys. Of Counsel: Patterson & Patterson, Clarksville, Arkansas. Adamson, Blair & Adamson, Terre Haute, Indiana.

[fol. 6] *Duly sworn to by George A. Merchant. Jurat omitted in printing.*

[fol. 7]

EXHIBIT "A" TO PETITION

National Coal Association

Southern Building

Washington, D. C.

United States

Department of the Interior

National Bituminous Coal Commission

Washington, D. C.

Order

At a Regular Session of the National Bituminous Coal Commission Held at Its Offices in Washington, D. C., on the 31st Day of August, 1938

Docket No. 68-FD

Investigation to Determine Whether or Not Certain Coals in the State of Arkansas Are Subject to the Provisions of the Bituminous Coal Act of 1937, and for the Further Purpose of Hearing Petitions for Exemption as Provided for by Orders Nos. 28 and 53;

and

In the Matter of the Petition of Sunshine Anthracite Coal Company for Exemption Under Sub-Section (b) of Section 17 of the Bituminous Coal Act of 1937, et al.

It Appearing that on the 24th day of September, 1937, the National Bituminous Coal Commission entered its Order No. 53 providing for a public hearing to be held at the Goldman Hotel, Fort Smith, Arkansas, on the 4th day of October, 1937, for the purpose of receiving evidence to enable the [fol. 8] Commission to determine whether certain coals in the State of Arkansas are subject to the provisions of the Bituminous Coal Act of 1937, and for the further purpose of hearing petitions for certificates for exemption as provided for by Order No. 28, and for the further purpose of hearing evidence upon the petition of the Sunshine Anthra-

cite Coal Company filed pursuant to said Order No. 28. The Commission assigned the cause to an examiner of the Commission for a hearing at the time and place designated by said Order No. 53; and

It Further Appearing that due and proper notice of said hearing was given to all interested parties and the cause came on to be heard pursuant to Order No. 53 and that a hearing was held, with opportunity for all interested parties to be heard and to present evidence. At said hearing, the Diamond Anthracite Coal Company and the D. A. McKinney Coal Company, each of Clarksville, Arkansas, intervened, participated in the hearing and subsequently filed formal petitions for certificates of exemption. The evidence being heard and submitted to the examiner, the examiner filed his report in the above entitled matter with the Secretary of the Commission on December 3, 1937, copies of which were thereafter served upon interested parties in conformance with Rule XXIII of the Rules of Practice and Procedure of the Commission.

Thereafter, on January 21, 1938, the Sunshine Anthracite Coal Company moved to dismiss the petition and for leave to withdraw all papers filed therewith. This motion was denied by the Commission on February 3, 1938. On February 14, 1938, the Diamond Anthracite Coal Company and the D. A. McKinney Coal Company each filed exceptions to the Report of the Examiner.

Subsequently, on the 28th day of April, 1938, the Commission filed the Proposed Report of Commission containing findings of fact and conclusions. A true copy of said Proposed Report of the Commission was served upon the interested parties on May 7, 1938, together with notice that exceptions thereto could be filed within thirty days and that any of said parties might apply for oral argument within said time limit. The Sunshine Anthracite Coal Company, the D. A. McKinney Coal Company and the Diamond Anthracite Coal Company duly filed separate exceptions to the Proposed Report of the Commission. The Sunshine Anthracite Coal Company filed a request to be heard upon oral argument, and the same being granted, oral argument upon behalf of said company was presented to the Commission on the 7th day of July, 1938. Whereupon, the record and evidence was again considered by the Commission; and

The Commission being fully advised of the evidence adduced at the hearing as the same is contained in the official

transcript of the testimony herein, and after argument finds that the findings of fact and conclusions submitted by the examiner are, in all respects true and correct, and that the findings of fact and conclusions contained in the Proposed Report of the Commission as filed herein are true and correct and are hereby adopted as the findings of fact and conclusions of the Commission; and the Commission further finds, for reasons stated in the separate opinion filed herein, that the exceptions filed to the Proposed Report of the Commission should be overruled.

Now, Therefore, it is by order determined:

1. That the underlying coal in the counties of Washington, Crawford, Sebastian, Scott, Madison, Franklin, Logan, Johnson, Pope, Yell and Conway, in the State of Arkansas, [fol.10] is bituminous coal within the meaning of the Bituminous Coal Act of 1937, and is therefore subject to the provisions of said Act.

2. That the exceptions of the Diamond Anthracite Coal Company and the D. A. McKinney Coal Company to the Proposed Report of the examiner are each and severally overruled.

3. That the separate and respective exceptions of the Diamond Anthracite Coal Company, the D. A. McKinney Company and the Sunshine Anthracite Coal Company to the Proposed Report of the Commission are hereby each and severally overruled.

4. That each of the separate petitions for certificates of exemption from the provisions of the Bituminous Coal Act of 1937 filed by the Diamond Anthracite Coal Company, the D. A. McKinney Coal Company and the Sunshine Anthracite Coal Company are hereby denied.

By Order of the Commission.

Dated this 31st day of August, 1938.

F. Witcher McCullough, Secretary. (Seal.)

[fol. 11]

EXHIBIT "B" TO PETITION

Before the National Bituminous Coal Commission

Docket No. 68-FD

In the matter of petition of Sunshine Anthracite Coal Company for exemption

Comes now the petitioner of the above entitled cause, and moves that the petition herein be dismissed, and asks leave that the papers be withdrawn from the files.

Dated at Washington, D. C., this 21st day of January, 1938.

Sunshine Anthracite Coal Company, by Henry Adamson, Attorney. Henry Adamson, 409-411 Star Building, Terre Haute, Ind.

[fol. 12]

EXHIBIT "C" TO PETITION

Copy

United States

Department of the Interior

National Bituminous Coal Commission

Washington, D. C.

Docket No. 68-FD

In the matter of petition of Sunshine Anthracite Coal Company for exemption.

Order on Motion to Dismiss

The petitioner above named having filed with the Commission on the 21st day of January, 1938, a motion to dismiss petition and asking leave to withdraw papers from the files in the above entitled matter, and the Commission having duly considered such motion,

Now, Therefore, it is hereby ordered:

That the motion above referred to be and the same is hereby denied.

The Secretary of the Commission shall forthwith mail a copy of this Order to the petitioner.

By order of the Commission.

Dated this 3rd day of February, 1938.

F. Witcher McCullough, Secretary. (Seal.)

[fol. 13]

EXHIBIT "D" TO PETITION

United States

Department of the Interior

National Bituminous Coal Commission

Washington, D. C.

Docket No. 68-FD

Investigation to Determine Whether or Not Certain Coals in the State of Arkansas Are Subject to the Provisions of the Bituminous Coal Act of 1937, and for the Further Purpose of Hearing Applications for Exemption as Provided for by Orders Nos. 28 and 53;

and

In the Matter of the Applications of Sunshine Anthracite Coal Company, Diamond Anthracite Coal Company and D. A. McKinney Coal Company for Exemption, Filed Pursuant to Orders Nos. 28 and 53 of the Commission.

Proposed Report of the Commission

The Commission promulgated its Order No. 28, on the 27th day of July, 1937, which order provided a method of procedure for the determination of the character of coals and for the issuance of certificates of exemption to producers of coals other than bituminous, semibituminous and subbituminous. The Sunshine Anthracite Coal Company, on August 31, 1937, filed its application for exemption pursuant thereto, alleging that the coals produced by it do not come within the regulatory provisions of the Bituminous [fol. 14] Coal Act of 1937, and praying for a certificate of exemption.

Thereafter, on September 24, 1937, the Commission entered its Order No. 53 providing for a public hearing for the purpose of receiving evidence to enable the Commission to determine whether or not certain coals in the State of Arkansas are subject to the provisions of the Bituminous Coal Act of 1937, and for the further purpose of hearing applications for exemption as provided for by Order No. 28. Said matter was assigned to Examiner Carmen A. Newcomb for hearing on October 4, 1937, at the Goldman

Hotel, Ft. Smith, Arkansas. Due and proper notice having been given, said hearing was commenced at the time and place therein stated, and concluded at 3:55 P. M. on October 6, 1937.

At said hearing Diamond Anthracite Coal Company, a partnership, and lessee of Diamond Anthracite Coal Company, a corporation, and the D. A. McKinney Coal Company, a corporation, with offices in the City of Clarksville, Arkansas, intervened and were granted permission to file applications for certificates of exemption, entered their appearance therein, and stipulated that the evidence to be adduced at said hearing be made applicable to them.

Subsequently, on January 21, 1938, the Examiner filed his report, proposed findings of fact and recommendations with the Commission, which were duly served upon all interested parties.

Thereupon the Sunshine Anthracite Coal Company filed its motion with the Commission to withdraw its application for exemption and all papers connected therewith; which motion, upon due consideration by the Commission, was denied. The applicants, Diamond Anthracite Coal Company [fol. 15] and D. A. McKinney Coal Company, within the time prescribed by Rule XXIII of the Rules of Practice and Procedure of the Commission, filed exceptions to the report of the Examiner and briefs in support thereof.

The Commission being fully advised of the evidence adduced at said hearing, as the same is contained in the official transcripts of the testimony and documentary evidence, filed herein, and upon due consideration of the report of the Examiner and the exceptions filed thereto, makes the following:

Findings of Fact

There are two coal bearing areas within the State of Arkansas, only one of which is of present commercial importance. No known production comes from the lignite bearing area in the eastern and southeastern part of the State. The coal bearing area, under consideration here is in the west central part of the State and extends eastward from the Arkansas-Oklahoma State Line for a distance of about one hundred miles. The field varies in width from about fifty miles at the State Line to about twenty-five miles at its eastern extremity. This coal bearing area falls within the limits of the following counties which are listed

from west to east: Washington, Crawford, Sebastian, and Scott; Madison; Franklin, and Logan, Johnson; Pope and Yell; and Conway. This area lies within the boundaries of District 14 as such district is defined in the Act, to-wit: "District 14. The following counties in Arkansas: All Counties in the State. The following counties in Oklahoma: Haskell, LeFlore, Sequoyah."

The seam from which the coals herein involved are mined is known as the Hartshorne bed. It extends from the town of Hartshorne in the State of Oklahoma eastward [fol. 16] a distance of approximately 150 miles to the town of Russellville in Pope County, Arkansas.

The coal bearing area, involved herein, is divided into mining districts—the mining district being a contiguous area in which a number of mines have been opened. These districts, with reference to the counties in Arkansas in which they are located, may be designated as follows:

Sebastian County: Districts—Huntington and Hartford,
Bates, Excelsior - Hackett,
Greenwood and Jenny Lind
Bonanza.

Scott County: Bates District.

Franklin County: Districts—Charleston, Philpott and
Denning-Coal Hill.

Logan County: Districts—Paris and Scranton.

Johnson County: Districts—Philpott, Denning-Coal Hill,
and Spadra.

Pope County: Districts—Russellville, including Ouita
Basin and Shinn Basin.

The Spadra district is situated in Johnson County between the Denning-Coal Hill field on the west and Russellville District in Pope County, which includes the Ouita Basin and Shinn Basin on the east. The coals mined in each of these districts are from the Hartshorne seam.

The Sunshine Anthracite Coal Company, Diamond Anthracite Coal Company, a partnership, and D. A. McKinney Coal Company, hereinafter referred to as the applicants, are engaged in the business of mining coal, operating mines in the Spadra District located in Johnson County within the State of Arkansas and in said District No. 14. These applicants sell and distribute coal in interstate commerce [fol. 17] and in competition with coals which are in interstate commerce.

The coals produced by the applicants are mined in the Spadra field. This field was opened about 1894 and 1895 by one Abe Stillwell, who, in order to introduce his coal in the market, called it anthracite because it was low in volatile content. For the purpose of advertising and stimulating trade from that time on each producer and sales agent has called it "Arkansas Anthracite" or "Spadra Anthracite." Applicant, Sunshine Anthracite Coal Company, has purchased coals from other mines in the Spadra field for resale, and has advertised and sold such coal on the market as "Arkansas Anthracite" coal.

Producers of coal operating mines in Johnson County, in which the Spadra district is located, and in Pope County, contiguous with Johnson County, produce coal similar in physical appearance and chemical analysis to the coals produced by applicants, and such producers concede that their coals are subject to the regulatory provisions of the Bituminous Coal Act of 1937. Similar coals are also produced in various fields within the Hartshorne seam and other seams within the State of Arkansas, and are considered by their producers to be subject to the Bituminous Coal Act of 1937.

We find from the record that there are in existence at least 17 systems of classifying coal. According to several of these systems Arkansas coals must be classified as semi-bituminous; according to others as semi-anthracite. Among these is the system of classification of coals by rank, adopted by the American Society for Testing Materials in September, 1937, upon which the applicants rely heavily. This system of classification does not provide a category known as semi-bituminous coal, whereas the Bituminous Coal Act [fol. 18] of 1937, approved prior to the classifications adopted by the A. S. T. M., provides specifically for a semibituminous classification and provides that "Bituminous" coal shall include "semibituminous."

Therefore, we find that certain analyses secured by the applicants purporting to show that their coals are semi-anthracite based on A. S. T. M. standards and submitted after the hearing was adjourned, if otherwise admissible as evidence, cannot be considered as controlling the determination of the issues in this proceeding. There is no ultimate authority or official classification and the classification of any particular coal depends on the system used. Analysis alone is not always a basis for classifying coals.

Heber Denman, Chairman of District Board No. 14, a graduate mining engineer who worked in the anthracite field in Pennsylvania in the Engineering department of a coal company and who since 1898 has operated coal mines in what is now the State of Arkansas, and who by training and experience we find qualified as an expert, classifies all coal produced in the State of Arkansas involved in this proceeding, and specifically in the Spadra district, in which the applicants are engaged in the business of mining coal, as semibituminous coal.

Other witnesses experienced in the mining and selling of coal produced in the area involved in this proceeding testified that the coal produced therein is different from anthracite coal in that it is softer than anthracite; that Arkansas coal gives off smoke, anthracite does not; that Arkansas coal is dirty, whereas anthracite is not; that different types of machinery are used to mine Arkansas coal from the types used to mine anthracite; that the wage rate paid to miners in Arkansas is based on the bituminous coal scale and not on the anthracite coal scale; that Arkansas coal [fol. 19] competes with low volatile bituminous coals from the Pocahontas field in West Virginia and not with Pennsylvania anthracite; that Arkansas coal is more akin in appearance and structure, in hardness and friability, to the low volatile bituminous coals of West Virginia than to the anthracite coal of Pennsylvania; that during the N. R. A., Arkansas coals were held subject to regulation as part of the bituminous coal industry by the Code Authority, while Pennsylvania anthracite was not so regulated; and that the advertising of Arkansas coals in the City of St. Louis as Arkansas anthracite was condemned as an unfair trade practice by the Fair Trade Practice Association on the basis that Arkansas coal was not in fact anthracite upon a ruling obtained from the Bureau of Mines and the United States Geological Survey.

We therefore find upon the basis of expert testimony and testimony of witnesses who have had long experience in the mining and distribution of coal produced in the districts involved in this proceeding that all coal produced in such districts, and particularly in the Spadra district, in which the mines of the applicants are located, is semibituminous coal.

Conclusions

On the basis of the foregoing findings of fact, we conclude:

That the coals produced by the applicants, the Sunshine Anthracite Coal Company, Diamond Anthracite Coal Company, a partnership, and D. A. McKinney Coal Company, in the State of Arkansas, are bituminous coals within the meaning of Section 17 (b) of the Bituminous Coal Act of 1937, and are subject to the regulation thereof.

That all coal produced in Washington, Crawford, Sebastian, Scott, Madison, Franklin, Logan, Johnson, Pope, Yell and Conway Counties, in the State of Arkansas, is bituminous coal within the meaning of Section 17 (b) of the Bituminous Coal Act of 1937, and is subject to the regulation thereof.

An appropriate order shall be entered, declaring that all coal produced in Washington, Crawford, Sebastian, Scott, Madison, Franklin, Logan, Johnson, Pope, Yell and Conway Counties, in the State of Arkansas, being within the boundaries of District 14, is subject to the Bituminous Coal Act of 1937, and denying the aforesaid applications filed by the Sunshine Anthracite Coal Company, the Diamond Anthracite Coal Company and the D. A. McKinney Coal Company.

[fol. 21] EXHIBIT "E" TO PETITION

United States

Department of the Interior

National Bituminous Coal Commission

Washington, D. C.

Docket No. 68-FD

In the Matter of the Application of Sunshine Anthracite Coal Company for Certificate of Exemption Filed Pursuant to Order No. 28

EXCEPTIONS OF SUNSHINE ANTHRACITE COAL COMPANY TO
PROPOSED REPORT OF THE COMMISSION

Comes now Sunshine Anthracite Coal Company and files herein its exceptions to the proposed report of the Com-

mission, which said report was filed in the office of the Secretary of the Commission on April 28, 1938, a copy of which said report was received by said Sunshine Anthracite Coal Company on the 12th day of May, 1938, and said Sunshine Anthracite Coal Company excepts to the findings of fact and conclusions therein contained as follows, to wit:

(Sunshine Anthracite Coal Company is attaching hereto a copy of the findings of fact and conclusions, and in order to facilitate reference thereto has numbered the paragraphs to the end that the exceptions hereinafter stated may be more readily applied.)

1. The proposed findings of fact do not contain finding that Sunshine Anthracite Coal Company is a code member. Unless the Sunshine Anthracite Coal Company is a code member, then the National Bituminous Coal Commission is [fol. 22] without jurisdiction of the subject matter, and any order entered would be null and void.

2. The record in the above matter conclusively shows that Sunshine Anthracite Coal Company is not a code member and has not accepted membership in the code provided for in the Bituminous Coal Act of 1937, and any order entered by the Commission, in so far as the Sunshine Anthracite Coal Company is concerned, would be null and void.

3. The proposed findings of fact set forth in paragraph 1 of the attached copy are not sustained by any substantial and proper evidence, and are irrelevant and improper as to the Sunshine Anthracite Coal Company.

4. The proposed findings of fact set forth in paragraph 2 of the attached copy are not sustained by any substantial and proper evidence, and are irrelevant and improper as to the Sunshine Anthracite Coal Company.

5. The proposed findings of fact set forth in paragraph 3 of the attached copy are not sustained by any substantial and proper evidence, and are irrelevant and improper as to the Sunshine Anthracite Coal Company.

6. The proposed findings of fact set forth in paragraph 4 of the attached copy are not sustained by any substantial and proper evidence, and are irrelevant and improper as to the Sunshine Anthracite Coal Company.

7. Sunshine Anthracite Coal Company excepts to that part of the proposed finding in paragraph 6, as follows:

"The coals produced by the applicants are mined in the Spadra field. This field was opened about 1894 and 1895 by one Abe Stillwell, who, in order to introduce his coal in the market, called it Anthracite because it was low in volatile content. For the purpose of advertising and stimulating trade from that time on each producer and sales [fol. 23] agent has called it 'Arkansas Anthracite' or 'Spadra Anthracite,' "

for the reason that said statement is not a finding of fact and is not supported by any substantial or proper evidence in the record, and as to the Sunshine Anthracite Coal Company is immaterial and irrelevant.

8. Sunshine Anthracite Coal Company excepts to all of the proposed findings in paragraph 7 of the attached copy, for the reason that said proposed findings are not supported by any substantial or proper evidence, and as to the Sunshine Anthracite Coal Company are totally immaterial and irrelevant.

9. Sunshine Anthracite Coal Company excepts to all of paragraph 8 of said proposed findings of fact hereto attached, for the reason that the proposed findings are not findings of fact but merely evidentiary statements, and for the further reason that said proposed findings as to Sunshine Anthracite Coal Company is immaterial and irrelevant.

10. Sunshine Anthracite Coal Company excepts to all of paragraph 9 of the attached copy of the proposed findings of fact for the reason that said proposed findings are not supported by any substantial or proper evidence.

11. Sunshine Anthracite Coal Company excepts to all of paragraph 10 of the attached proposed findings of the Commission, for the reason that said proposed findings of fact are merely the statement of the evidence of one particular witness, and for the further reason that said proposed findings are not supported by substantial or proper evidence in the record, and for the further reason that as to the Sunshine Anthracite Coal Company said findings would be immaterial and irrelevant.

[fol. 24] 12. Sunshine Anthracite Coal Company excepts to the proposed finding No. 11 in the copy attached hereto, for the reason that said finding is not a finding of facts, but a mere statement of evidentiary matters, and for the further

reason that said evidentiary matters are immaterial and irrelevant to the Sunshine Anthracite Coal Company.

13. Sunshine Anthracite Coal Company excepts to all of paragraph 12 in the attached proposed findings of the Commission for the reason that said proposed findings are not supported by any proper or substantial evidence.

And the said Sunshine Anthracite Coal Company excepts to the so-called conclusions set forth in said proposed report of the Commission for the following separate and several reasons, to wit:

1. There is no proper or substantial evidence in the record to sustain the conclusion that the coal produced by the Sunshine Anthracite Coal Company is bituminous coal within the meaning of Section 17-b of the Bituminous Coal Act of 1937.

2. That the proposed conclusion is an attempt by the National Bituminous Coal Commission to enlarge the authority conferred on the Commission by the Bituminous Coal Act of 1937, and is beyond the power and authority conferred on the National Bituminous Coal Commission by said act.

3. That said proposed conclusion is an improper and invalid construction of the law as applied to the facts found in the evidence in the record in this cause.

4. That the said Sunshine Anthracite Coal Company has not been accorded a fair hearing conducive to the impartial and independent determination of the issue tendered by its [fol. 25] informal application. The so-called hearing as disclosed by the record was in the nature of a general hearing for the entire State of Arkansas conducted without limitation as to evidence, its admissibility or relevancy, and the proposed findings demonstrate that they are based on improper evidence of generalities, improper comparisons and improper so-called concessions and admissions by persons or corporations other than the Sunshine Anthracite Coal Company, and not relevant to the informal application for exemption of the Sunshine Anthracite Coal Company.

Respectfully submitted, Adamson, Blair & Adamson,
Attorneys for Sunshine Anthracite Coal Company.
Adamson, Blair & Adamson, 409-411 Star Building,
Terre Haute, Indiana.

[File endorsement omitted.]

[fol. 26] IN UNITED STATES CIRCUIT COURT OF APPEALS,
EIGHTH CIRCUIT

[Title omitted]

APPEARANCE OF COUNSEL FOR PETITIONER—Filed Oct. 10, 1938

The Clerk will enter my appearance as Counsel for the
Petitioner.

Henry Adamson.

APPEARANCE OF COUNSEL FOR RESPONDENT—Filed Mar. 18,
1938

The Clerk will enter my appearance as Counsel for the
Respondent.

Robert E. Sher.

[File endorsements omitted.]

[fol. 27] IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER OF SUBMISSION—March 14, 1939

This cause having been called for hearing in its regular order, argument was commenced by Mr. Henry Adamson for petitioner, continued by Mr. Robert E. Sher, Special Assistant to Attorney General, for respondent, and concluded by Mr. Henry Adamson for petitioner.

Thereupon, this cause was submitted to the Court on the record of proceedings before the National Bituminous Coal Commission and the briefs of counsel filed herein.

[fol. 28] IN UNITED STATES CIRCUIT COURT OF APPEALS,
EIGHTH CIRCUIT

No. 421, Original. May Term, A. D. 1939

SUNSHINE ANTHRACITE COAL COMPANY, Petitioner,

vs.

NATIONAL BITUMINOUS COAL COMMISSION, Respondent

Petition to Review Order of National Bituminous Coal Commission

Mr. Henry Adamson (Mr. George O. Patterson, Jr., Messrs. Patterson & Patterson, and Messrs. Adamson, Blair & Adamson were with him on the brief) for petitioner.

Mr. Robert E. Sher, Special Assistant to the Attorney General (Mr. Thurman Arnold, Assistant Attorney General; Mr. Hugh B. Cox and Mr. Robert L. Stern, Special Assistants to the Attorney General; Mr. Robert W. Knox, General Counsel, and Mr. John W. Nance, Attorney, National Bituminous Coal Commission, were with him on the brief) for respondent.

Before Gardner and Woodrough, Circuit Judges, and Otis, District Judge

OPINION—June 19, 1939

WOODROUGH, Circuit Judge, delivered the opinion of the court.

The Sunshine Anthracite Coal Company has petitioned for a review of an order of the National Bituminous Coal [fol. 29] Commission by which it was determined that the underlying coal in certain counties of Arkansas is bituminous coal within the meaning of the Bituminous Coal Act of April 26, 1937 (15 U. S. C. A. 829 et seq.), and by which the petitioner's coal was denied exemption from the operation and effect of the Act.

The record discloses that the Sunshine Anthracite Coal Company, petitioner herein, is a corporation engaged in the production of coal in what is known as the Spadra field, located in Johnson County, Arkansas. Practically all of its coal is sold in states other than Arkansas. On July 27, 1937, the National Bituminous Coal Commission issued its Order No. 28, providing a method whereby producers of coal might secure a determination by the Commission as to whether or not their coal is subject to the Bituminous Coal Act of 1937. On August 31, 1937, petitioner filed with the Commission an application for a certificate exempting it from the operation and effect of the Bituminous Coal Act of 1937 on the ground that the coal produced by it is not bituminous coal as defined in Section 17 of the Act, which reads in part:

“As used in this Act—

(a) The term ‘coal’ means bituminous coal.

(b) The term ‘bituminous coal’ includes all bituminous, semibituminous, and subbituminous coal and shall exclude lignite, which is defined as a lignitic coal having calorific value in British thermal units of less than seven thousand

six hundred per pound and having a natural moisture content in place in the mine of 30 per centum or more."

On September 24, 1937, the Commission issued Order No. 53, directing that a public hearing be held on October 4, 1937, at Fort Smith, Arkansas, for the purpose of receiving evidence to enable the Commission to determine whether or not any part of the coal produced in Arkansas is or is not bituminous coal as defined in Section 17(b) of the Act. The Order further provided that the hearing should include a hearing on the application for exemption filed by the Sunshine Anthracite Coal Company and on any other applications for exemption filed from the State of Arkansas pursuant to Order No. 28. An examiner was assigned to conduct the hearing.

[fol. 30] After notice, the hearing was held as directed on October 4, 5, and 6, 1937. At the hearing the Sunshine Anthracite Coal Company introduced evidence in support of its claim that the coal produced by it was not bituminous coal within the meaning of the Act. This evidence was to the effect that petitioner's coal is mined from what is known as the Spadra field in Johnson County, Arkansas; that coal from this field has been advertised and sold as Arkansas anthracite in various markets for a number of years; that by certain methods of classifying coals by rank on the basis of chemical analysis, including the method adopted by the American Society for Testing Materials, petitioner's coal is classified as semianthracite.

When petitioner concluded the presentation of its evidence, the examiner heard further evidence upon the question indicated by the order of hearing. This evidence tended to show the term "anthracite coal" had come to be identified in the trade as Pennsylvania anthracite; that there is a substantial difference in price between Spadra coal and Pennsylvania anthracite; that coal produced by petitioner and others from the Spadra field is sold in the various markets of the middle west in direct price competition with West Virginia Pocahontas, which is a low volatile bituminous coal; that in its physical characteristics Spadra coal more nearly resembles other bituminous coals than Pennsylvania anthracite; that Spadra coal burns with a yellowish flame, which is characteristic of bituminous, rather than with a blue flame, which is characteristic of anthracite; that the methods and appliances used in mining the coal are similar to those used in mining bituminous coal in other parts of the

country and differ materially from the methods used in mining anthracite; that the miners in the Spadra field are paid on the basis of the bituminous contract of the United Mine Workers and not on the basis of the higher wage scale in effect in the anthracite field.

The evidence further showed that there were at least sixteen different methods of classification of coals by rank, on the basis of chemical analysis, under some of which petitioner's coal would be classified as bituminous and under others as semianthracite; that while under the method of classification adopted by the American Society for Testing [fol. 31] Materials petitioner's coal would fall in the semianthracite class, it is very close to the dividing line between semianthracite and the highest ranking bituminous coal; that the American Society for Testing Materials, which is a private organization without official status, issued certain standards as tentative in the year 1934; that such standards have been changed in certain respects from year to year until its present standards were adopted in 1937, after passage of the Bituminous Coal Act of 1937.

At the conclusion of the evidence the examiner took the matter under advisement. On January 21, 1938, he filed a report, which is dated December 3, 1937, containing proposed findings of fact and a recommendation that an order be entered declaring all coals produced in the State of Arkansas to be subject to the Bituminous Coal Act of 1937 and that petitioner's application for exemption be denied. On the same day petitioner filed with the Commission a motion for voluntary dismissal of its application for exemption. This motion was denied by the Commissioner on February 3, 1938.

Petitioner was served with a copy of the examiner's report and filed exceptions thereto. On April 28, 1938, the Commission issued a proposed report containing tentative findings of fact and a conclusion that all coal in the State of Arkansas, including that of petitioner, is subject to the Bituminous Coal Act of 1937. Petitioner was served with a copy of the proposed report and findings and given thirty days in which to file exceptions. Exceptions were filed and on July 7, 1938, counsel for petitioner appeared before the Commission and made oral argument in support of its position.

On August 31, 1938, the Commission rendered an opinion in which it reaffirmed the position taken in its earlier report that all coals produced in Arkansas, including that of peti-

tioner, are subject to the Act. An order was entered the same day denying petitioner's application for exemption and declaring that all coals produced in certain named counties in Arkansas are bituminous coal. Petitioner did not file any objections or exceptions to the final order of the Commission but petitioned this court for review under Section 6-b (15 U. S. C. A. 836b).

[fol. 32] The petitioner's assignments of error to this court present (1) that the Commission was without jurisdiction; (2) that it erred in denying the petitioner's motion for voluntary dismissal; (3) that the findings and order are without substantial evidence to support them.

(1)

Jurisdiction. The petitioner contends that the jurisdiction of the National Bituminous Coal Commission in fixing maximum and minimum prices, rules and regulations, is limited by the Act to coal producers who have accepted the code, and that as petitioner has not become a code member the Commission is given no power to hold a hearing and determine the class or kind of coal produced from petitioner's mines. It argues that "whether or not the coal it produces is bituminous, anthracite, semi-anthracite, lignitic or what not, is of no interest to the Commission until such time as the producer applies for membership in the Code".

The Commission has rested its jurisdiction to determine whether petitioner's coal is bituminous within the meaning of the Act upon two separate and distinct bases: (1) Upon the general power of the Commission to make all reasonable rules and regulations for carrying out the provisions of the Act¹ and (2) upon the power to grant exemptions under Section 4 A.²

¹"Such Commission shall have the power to make and promulgate all reasonable rules and regulations for carrying out the provisions of this subchapter * * *." 15 U. S. C. A. 829 (a).

²"Any producer believing that any commerce in coal is not subject to the provisions of sections 831, 832 and 833 or to the provisions of the first paragraph of this section may file with the Commission an application, verified by oath or affirmation for exemption, setting forth the facts upon which such claim is based. The filing of such application in good faith shall exempt the applicant, beginning with the third

[fol. 33] We think the grounds of jurisdiction relied upon by the Commission are fully sustained. They are presented as follows:

"The Bituminous Coal Act provides that the National Bituminous Coal Commission established thereunder shall proceed to fix minimum prices for coal. District boards of producers are to be organized. Section 4-I (a). These Boards, as soon as possible after their creation, are to determine from cost data submitted to them by the statistical bureaus of the Commission 'the weighted average of the total costs of the ascertainable tonnage produced in the district in the calendar year 1936.' Section 4-II (a), 7th paragraph. The Commission is then to determine from the weighted average costs submitted by the district boards the average costs of larger geographic units known as minimum price areas. Section 4-II (a), 7th paragraph. The Commission transmits the average so determined back to the dis-

day following the filing of the application, from any obligation, duty, or liability imposed by sections 831, 832 and 833 with respect to the commerce covered by the application until such time as the Commission shall act upon the application. If the Commission has reason to believe that such exemption during the period prior to action upon the application is likely to permit evasion of the sub chapter with respect to commerce in coal properly subject to the provisions of sections 831, 832 and 833 or of the first paragraph of this section, it may suspend the exemption for a period not to exceed ten days. Within a reasonable time after the receipt of any application for exemption the Commission shall enter an order granting, or, after notice and opportunity for hearing, denying or otherwise disposing of such application. As a condition to the entry of and as a part of any order granting such application, the Commission may require the applicant to apply periodically for renewals of such order and to file such periodic reports as the Commission may find necessary or appropriate to enable it to determine whether the conditions supporting the exemption continue to exist. Any applicant aggrieved by an order denying or otherwise disposing of an application for exemption by the Commission may obtain a review of such order in the manner provided in subsection (b) of section 836." 15 U. S. C. A. 834.

trict boards, and each board is required to propose minimum prices for each district so as to yield a return equal to the weighted average cost of its minimum price area. Section 4-II (a), 3rd paragraph. The prices so proposed are to be submitted to the Commission for approval, disapproval, or modification. Section 4-II (a), 5th paragraph. Prices then are to be coordinated among the various districts and the coordinated prices submitted to the Commission for approval. Section 4-II (b).

"The activities of the Commission and the district boards can not, of course, be carried on unless they know what coal is subject to the Act. The very first step in the price fixing process is the determination of the weighted average cost 'of the ascertainable tonnage' of the coal produced in each district. Thus, at the very beginning some means of defining 'ascertainable tonnage' is necessary.

"Section 17 of the Act contains the basic definitions. But its definitions do not in themselves establish any mechanism for determining what coal comes within them.

"At the very beginning of its proceedings the Commission found itself faced with the necessity of deciding what coal was to be included within the 'ascertainable tonnage' in computing average costs. The determination had to be [fol. 34] made in advance of other action if the Commission was to proceed. The Act did not create any other agency than the Commission capable of making it. The Commission obviously was not in a position to call upon the courts to construe the Act for it in that stage of the proceedings in order to aid it in its administrative process.

"Section 2 (a) of the Act authorizes the Commission to make all reasonable rules and regulations for carrying out the provisions of the Act. Since the Commission could not function unless the nature of the coal subject to the Act was determined, it issued its Order No. 28, which provided a procedure for determining what coal was subject to and what exempt from the statute. Subsequently it ordered a general investigation to be held as to the character of coals in Arkansas, and combined the hearing under the latter order with that on petitioner's application for exemption.

"We believe that the power of the Commission to make such orders would be implied from the inherent necessities of the situation, even if there had been no authority in the Act to make all reasonable rules and regulations. Congress

obviously did not intend that the scope of operation of the Act in certain areas containing coal on the border line of the statutory definition should remain indefinitely indeterminate. The statute plainly could not be carried out unless and until it was decided which coal came within the statutory definition.

"There is ample precedent for administrative bodies determining their own jurisdiction at the commencement of the investigation of a question, subject, of course, to appropriate judicial review. In *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41, an employer sued to restrain the National Labor Relations Board from holding a hearing on a complaint of alleged unfair trade practices on the ground that the employer was not engaged in interstate or foreign commerce and therefore not within the jurisdiction of the Board. In disposing of this contention, the Court said, at p. 49:

" 'It is true that the Board has jurisdiction only if the complaint concerns interstate or foreign commerce. Unless the Board finds that it does, the complaint must be dismissed. And if it finds that interstate or foreign commerce [fol. 35] is involved, but the Circuit Court of Appeals concludes that such finding was without adequate evidence to support it, or otherwise contrary to law, the Board's petition to enforce it will be dismissed, or the employer's petition to have it set aside will be granted.'

"The National Labor Relations Act does not expressly authorize the Labor Relations Board to determine whether or not an employer is engaged in interstate or foreign commerce. Section 8 of that act (29 U. S. C., Sec. 158) defines certain unfair labor practices. Section 10 (a) (29 U. S. C., Sec. 160[a]) provides that the Board is empowered to prevent any person from engaging in any unfair labor practice (listed in Section 158) affecting commerce. The term 'affecting commerce' is defined as meaning in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce. On the basis of this language the Supreme Court held that it is for the Board to determine, after notice and hearing, whether or not a particular unfair labor practice affects commerce. So here, where a determination of the character of coals in different parts of the country was

a necessary incident to the performance of its other functions, the Commission was authorized to make the necessary determination.⁽¹⁾ Other cases in which the Supreme Court has indicated that it was proper for administrative agencies to determine their own jurisdiction are *Interstate Commerce Commission v. Humboldt Steamship Co.*, 224 U. S. 474; *United States ex rel. Chicago Great Western Railroad Co. v. Interstate Commerce Commission*, 294 U. S. 50.

"Petitioner argues that any power the Commission may have to determine what coal is subject to its jurisdiction is limited to 'code members,' and that since it is not a code member, the Commission's authority does not extend to it. The contention is that since the Commission is authorized to fix prices only for code members,⁽²⁾ there is no reason for it to be interested in the nature of the coal produced by [fol. 36] non-code members. It is true that the Commission may only fix minimum prices for code members, and then only for sales of coal in or directly affecting interstate commerce. But the general powers of the Commission are not limited to code members. The Commission is required to base its weighted average cost figures—on which all the minimum prices ultimately rest—on the 'ascertainable tonnage' in the district, not alone on that of code members. In order that it may obtain reports on costs from all producers, Section 10 (a) of the Act authorizes the Commission to require cost reports from 'producers,' not merely from code members. Producers are defined in the Act as meaning 'all individuals, firms, associations, corporations, trustees, and receivers engaged in the business of mining coal,' whereas code members mean only 'producers accepting membership in the code.' Section 4.

"In a case involving the status of these cost reports, the only case under the Coal Act which has reached the Supreme

"(1) We are not here concerned with the scope of judicial review of such determinations or whether the courts may have wider latitude in reviewing when the jurisdictional question relates to the limits of federal constitutional power than otherwise.

"(2) Producers who do not accept the code and thereby become code members are required to pay a 19½ per cent tax on gross sales. Section 3.

Court, that Court held that the 'language of Section 10 (a) applies to all producers.' *Utah Fuel Co. v. National Bituminous Coal Commission*, 59 S. Ct. 409, decided January 30, 1939.

"The Commission is thus plainly empowered to require the filing of cost reports by all producers of bituminous coal, whether code members or not. Since it must have such information as to costs from all producers, its power to determine what coal is bituminous must likewise extend to noncode members as well as to code members.

"Petitioner's suggestion that the jurisdiction of the Commission is limited to code members would lead to extremely impractical results. If the costs of only code members could be considered in computing the weighted average cost upon which prices were to be based, that average would change almost daily, whenever a new producer accepted the code. A national price structure built on such a shifting base would be an extremely unstable one. Moreover, it was obviously more desirable from the standpoint of both the public and the industry to give the minimum prices the broadest possible foundation of average cost.

"We think that the necessary power of the Commission to determine what coal comes within the Act must apply [fol. 37] equally to code members and to noncode members. Thus, the Commission had jurisdiction both generally to investigate the status of all coal in Arkansas and specifically to determine whether petitioner's coal was subject to the Act.

"(2) What has been said demonstrates that in order to accomplish its statutory duties the Commission must have power on its own initiative to investigate the status of coal to determine whether it is subject to the Act, regardless of whether particular producers file applications for exemption. By Section 4-A of the Act Congress established a procedure specially designed to give protection to individual producers claiming to be exempt.

"The second paragraph of Section 4-A provides that any producer believing that any commerce in coal is not subject to the provisions of Section 4 of the first paragraph of 4-A may file with the Commission an application for exemption. The filing of such an application exempts the applicant beginning with the third day thereafter from the obligations imposed by Section 4 of the Act. Within a reasonable time after receipt of an application for exemption the Com-

mission is required to enter an order granting, or after notice and opportunity for hearing, denying or otherwise disposing of such application. An order of the Commission disposing of such application is reviewable in the manner provided in Section 6 (b).

"The section thus provides a complete and adequate remedy, including protection during the course of the administrative proceeding, for persons claiming to be exempt from the Act.

"The contention of petitioner that this section is not applicable to noncode members, and consequently is not applicable to it, is inconsistent with the theory on which petitioner has invoked the jurisdiction of this Court, which seems to be bottomed largely on Section 4-A. But apart from this it is plain that Section 4-A is not limited in application to code members. It provides that 'any producer' may file an application for exemption. As we have pointed out 'producer' is defined in the Act as including all producers of coal, while 'code members' is defined as meaning only those producers who accept the code. The decision of the Supreme Court in the Utah Fuel case, *supra*, that the [fol. 38] word 'producer' as used in Section 10 (a) applies 'to all producers' is plainly controlling with respect to the same word as used in Section 4-A.

"The obvious purpose of Section 4-A also reflects that it was intended to apply to all producers rather than merely to code members. Congress sought to establish a procedure to enable producers to know whether they were subject to the Act. Producers who were not code members might for various reasons desire to know whether or not they were exempt before joining the code; the decision on their application for exemption might determine whether or not they would accept the code.

"In this case petitioner filed an application for exemption with the Commission. The Commission, following the procedure prescribed in the statute, held a hearing and entered an order. Petitioner now, still following the plan outlined in Section 4-A, seeks to have that order reviewed in this Court. Under these circumstances there can be no doubt as to the Commission's jurisdiction to hold the hearing and make the order involved in the review.

"As the Commission had jurisdiction to make the determination as to whether petitioner's coal was subject to the

Act, the scope of judicial review of its ruling is that set forth in the recent opinion of the Supreme Court in *Shields v. Utah Idaho Central R. R. Co.*, 59 Sup. Ct. 160, (305 U. S. 177, 185) decided December 5, 1938. The Court there said, at p. 165:

“ ‘As this authority [to make the determination in question] was validly conferred upon the Commission, the question on judicial review would be simply whether it had acted within its authority.’ [Citing cases.]

“ ‘The condition which Congress imposed was that the Commission should make its determination after hearing. There is no question that the Commission did give a hearing. Respondent appeared and the evidence which it offered was received and considered. The sole remaining question would be whether the Commission in arriving at its determination departed from the applicable rules of law and whether its finding had a basis in substantial evidence or was arbitrary and capricious. That question must be determined upon the evidence produced before the Commission.’ [fol. 39] ‘The principles there set forth are plainly applicable here whether the Commission’s authority is derived from the express language of section 4-A or the general provisions of section 2 (a).

“Section 6 (b) of the Bituminous Coal Act provides that the findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. It should be noted that in the *Shields* case the statute involved did not contain any such provisions, so that the limitation upon the scope of judicial review there recognized *a fortiori* applies here.”

(2)

Petitioner’s motion for voluntary dismissal of its petition for exemption was made on the same day that the report of the examiner was filed, though the examiner’s report bears date some six weeks earlier. The petitioner’s position is that it had unqualified right to dismiss. *Jones v. Securities Exchange Commission*, 298 U. S. 1, is cited and relied on.

In order for the Commission to perform the functions required of it by the terms of the Bituminous Coal Act it was necessary that it should proceed as one of the first steps to make determination whether the coals in the counties of Arkansas were subject to the Act. The public interest in the effective administration of the Act required that to be

done, irrespective of the petitions for exemption presented by the petitioner and the two other Arkansas coal producing companies which associated themselves with the petitioner in the claims for exemption. Some of the Spadra coal producers thought their coal was bituminous within the Act, but it was recognized by all of them that a decision had to be made covering the whole field. The Commission accordingly gave the notice and caused the hearing to be had "for the purpose of receiving evidence to enable the Commission to determine whether or not any part of the coal produced in the State of Arkansas does not come within the purview of Section (b) of the Act." Although the petition for exemption presented by the Sunshine Anthracite was in the form of affirmative action taken by it and in the order of taking the proof at the hearing the Sunshine company presented evidence first, the real moving party seeking determination of the broad question as to the applicability of the [fol. 40] Act to Arkansas coals was the Commission. The petitioner opposed the conclusion that all the coals in the area were within the Act. It could not by dismissing its petition prevent the Commission from making determination upon that question which was the subject matter of the hearing.

The Commission's determination set forth in the first paragraph of the order under review that all Arkansas coals, including those of petitioner, are subject to the Act, would be equally binding upon petitioner whether it withdrew from the hearing before the final decision thereon or not.

The case of *Jones v. Securities Exchange Commission*, supra, does not support the petitioner's assignment of error. There Jones had withdrawn his application for registration of his securities before hearing, and the court found nothing in the record to indicate that the public or investors would be prejudiced by stopping the proceedings or dismissing the same. The court said:

"In this proceeding, there being no adversary parties, the filing of the registration statement is in effect an *ex parte* application for a license to use the mails and the facilities of interstate commerce for the purposes recognized by the act. We are unable to see how any right of the general public can be affected by the withdrawal of such an application before it has gone into effect. Petitioner emphatically says that no steps had been taken looking to the issue of the

securities; and this is not denied. So far as the record shows, there were no investors, existing or potential, to be affected. The conclusion seems inevitable that an abandonment of the application was of no concern to anyone except the registrant. The possibility of any other interest in the matter is so shadowy, indefinite, and equivocal that it must be put out of consideration as altogether unreal. Under these circumstances, the right of the registrant to withdraw his application would seem to be as absolute as the right of any person to withdraw an ungranted application for any other form of privilege in respect of which he is at the time alone concerned."

In this case there were other interests than those of the petitioner concerned in the hearing—the interest of the public in the effective administration of the Act, and the interests of petitioner's competitors. Some competitors who had accepted the Act were convinced that if petitioner could obtain exemption from the Act it could drive all its Arkansas competitors from the field. Although the Arkansas coal has great merit, it is hard to sell in sufficient quantity to maintain the mine organization or to provide continuous employment for the miners. The competition among the mines presents the most difficult problem of the operators, and those competitors who did not associate themselves with petitioner to deny that the Arkansas coal was within the Act were vitally concerned to have it determined that the Act applied to all alike. We find no prejudicial error in the denial of petitioner's motion to dismiss made after the conclusion of the hearing.

(3)

The Evidence: The testimony before the Commission, which has been epitomized for this Court by counsel of the Commission and carefully compared and considered, included that of H. W. Collier. He has been in the coal-mining business since 1901 and at the time of the hearing was operating a mine in the Spadra field, three or four miles from petitioner's mine, taking coal of the same type from the same seam. He identified certain samples of coal taken from petitioner's mine and other mines in the same vicinity and testified that in his opinion they were all semibituminous. He testified that semibituminous is a smokeless coal and cokes very little. Anthracite coal burns with a blue

flame, all other coals with a more or less yellow flame. All Arkansas coals have a more or less yellow flame. Spadra coal does not resemble Pennsylvania anthracite in looks, hardness, or friability. Pennsylvania anthracite is much harder and less friable than Spadra or other coals in that section. Spadra coal is very similar in appearance to West Virginia Pocahontas and Paris, both of which are semibituminous. He further testified that south of Omaha, Nebraska, Spadra coal competes primarily with other coals from Arkansas and Oklahoma; north of Omaha almost entirely with Pocahontas. In the Twin Cities the retail prices of Spadra and Pocahontas are usually about the same. Spadra prices are based on the prices of other coals in the immediate vicinity and of Pocahontas; not on Pennsylvania anthracite.

[fol. 42]. Heber Denman testified that he was graduated from Lehigh University as a mining engineer in 1882 and has been operating mines in Oklahoma and Arkansas since 1898; that Spadra coal is taken from what is known as the Hartshorne seam and that coals from that seam are generally known and recognized as semibituminous. He further testified that all of the coal introduced in evidence (which included a sample from petitioner's mine) was semibituminous with the exception of Exhibit 1, which he identified as Pennsylvania anthracite. He further testified that Spadra coals compete primarily with other coals from the vicinity and with Pocahontas from West Virginia. On cross-examination he testified that there is a difference between Spadra coal and some of the other coals in Arkansas, that they differ with respect to the hardness of the coal and in the amount of fixed carbon and volatile matter, but that the difference is not sufficient to place Spadra coal in a different classification. He reiterated the opinion expressed on direct examination that Spadra coal is semibituminous.

S. A. Bramlette testified that he has been connected with the coal industry for 40 years, and that there was no anthracite or semianthracite coal in Arkansas; that Arkansas coals compete primarily with other coals from the same general area, but more particularly with West Virginia Pocahontas, which is a low volatile, high grade bituminous coal. He further testified that at one time he put on an exhibit of Spadra coal at the State Fair at Little Rock at the request of the producers of that field to demonstrate

the burning quality of the coal. On the basis of his experience and observation in connection with that experiment, he testified that Spadra coal is slow in igniting, but lights with a yellowish flame, and that the yellowish flame continues until the entire mass of coal becomes a red body. He also testified that the term semianthracite denotes a lower rank of coal than anthracite, whereas the term semibituminous is the same as superbituminous and denotes a higher rank of coal than bituminous. Subbituminous is a lower rank than bituminous. He also testified that Spadra coal competes principally with West Virginia Pocahontas and not with Pennsylvania anthracite.

J. G. Puterbaugh testified he has been in the coal business for 42 years and at the time of the hearing was operating a [fol. 43] mine at Spadra, about three-quarters of a mile from that of petitioner, taking coal from the same seam. He testified that Spadra coal has the appearance of West Virginia Pocahontas as well as of other coals produced in Western Arkansas; that it is not as bright, shiny, or brittle as Pennsylvania anthracite; that wages in the Spadra mine are fixed on the basis of the bituminous wage contract of the United Mine Workers; that the price of Spadra coal is fixed on the basis of the prices of other coals produced in Arkansas. He further testified that the market for Spadra coal is in western Missouri, eastern Kansas, and eastern Nebraska, and to a larger extent in Minneapolis and St. Paul, where it competes primarily with Pocahontas. In the winter of 1936-7, the retail price of Pocahontas in Minneapolis was 90¢ a ton higher than the retail price of Spadra. On the first of September, 1937, the retail price of Pocahontas was 50¢ lower than Spadra. The prices of the two coals are very close together and fluctuate about as those figures indicate.

R. A. Young testified he has been a coal operator for 40 years and at one time was Arkansas state mine inspector; that in his opinion there was no semianthracite coal in Arkansas, and that all Arkansas coal was bituminous.

David Fowler, president of District 21 of the United Mine Workers, testified that he had been in the coal industry since he was nine years old; that he had worked in the mines for 35 years, most of the time in the anthracite fields of Pennsylvania but some of the time in various bituminous

fields. He stated that he was able to distinguish anthracite and bituminous by their appearance; that all of the coals introduced in evidence (including that from petitioner's mine) were either bituminous or semibituminous, except for Exhibit 1, which he identified as Pennsylvania anthracite. He further testified that the United Mine Workers have two basic contracts, one for bituminous and one for anthracite; that the wage scale in the Spadra field is based on the bituminous contract; that had the anthracite contract been in effect, the miners would have received three dollars a day more. He further testified that there is a great difference in the methods of mining in the anthracite fields of Pennsylvania and the methods used in the Spadra field in Arkansas.

[fol. 44] Petitioner's president stated that they were perfectly willing to admit that they mine coal differently in the anthracite fields of Pennsylvania than they do in Arkansas, no matter what the seam.

Petitioner's Exhibit 10 shows that the prices of "Arkansas Anthracite" and of West Virginia Pocahontas in effect in Minneapolis in November, 1935, were substantially the same. Arkansas egg was \$13.45 a ton; Pocahontas egg was \$13.70; Arkansas stove was \$13.70 a ton; Pocahontas stove was \$13.40. Pennsylvania anthracite was approximately \$2.50 a ton higher in price.

The Commission found, i. a.

"2. The Coal produced by petitioner and interveners is generally similar to the high-grade bituminous coals of other fields, such as the Pocahontas Smokeless coals of West Virginia. The structure is hard but not as hard as Pennsylvania anthracite coal, nor does it have the structure and appearance of anthracite. It is a low volatile coal with a high percentage of fixed carbon, but not as high as that of anthracite, and the sulphur content is high. It is mined in the same manner as bituminous coal is mined which differs materially from the methods of mining anthracite. Spadra coal, including that of petitioner and interveners is mined under the Bituminous Wage Scale which is substantially lower than the Anthracite Wage Scale. Spadra coal has the appearance of bituminous coal and its burning characteristics are similar thereto and unlike those of anthracite. Coals mined in adjoining fields have qualities comparable with the coals of the Spadra field, although they differ slightly in volatile matter and fixed carbon, but the

difference is so slight as to be unnoticeable in the merchandising thereof. The coals of adjoining producers in the Spadra field enter the same consuming markets as the coals of the petitioner and interveners in competition with one another without regard to differences in their qualities. All Spadra coals are competitive in northern markets with the Smokeless coals of West Virginia and other high-grade bituminous coals, but in no markets are they competitive with Pennsylvania anthracite."

"5. There was much expert testimony offered to the effect that all coal in the Spadra field is bituminous coal. There is noticeable agreement among all the witnesses and it is [fol. 45] admitted by petitioner and interveners that their coal is the same as that produced by their neighbors in the same field. The great weight of the expert testimony is to the effect that all Spadra coal is bituminous, is well established as such, and has been so established over a long period of years in the various markets into which it moves."

It is the position of the Commission that it was not bound to make its determination as to the status of the coal solely on the basis of the chemical analysis of the coal calculated according to the formula adopted by the American Society for Testing Materials. Its counsel presents:

"In the first place, chemical analysis alone is not controlling. It is a factor that is entitled to consideration. In its opinion the Commission recognizes that chemical analysis, including the proper fuel ratio, is an important element to be considered. But it is not the sole factor. If Congress had intended that chemical analysis was to be the sole guide for Commission action, it is reasonable to suppose that it would have said so in plain and explicit language.

"That no one factor is controlling in determining the classification of coal is clearly indicated by the Supreme Court in *Heisler v. Thomas Colliery Co.*, 260 U. S. 245. In that case it was argued that because anthracite and bituminous were directly competitive, it was arbitrary to classify them differently for purposes of taxation. The Court held that the mere fact of competition was not controlling, but that all other factors, such as the amount of fixed carbon, the amount of volatile matter, color, lustre, structural character, and other physical characteristics were

entitled to consideration. On the basis of all of these factors, not of any one alone, it was held that the differences in the two coals afforded a sufficient basis for classifying them differently.

"It does not appear that Congress intended that the particular formula for classifying coals by rank adopted by the American Society for Testing Materials shall be binding on the Commission.

"L. N. Plein, formerly with the Bureau of Mines and presently employed as a technician by the Bituminous Coal Commission, testified as to the history of classification of coal. He testified that since 1800 there have been many attempts to classify coal in some way or other. He named [fol. 46] at least sixteen methods that had been put forward by different authors. He stated that all of these various methods of classifying coals are very confusing when we come to the practical side of determining what coal is and how to sell it. In 1927 the American Society for Testing Materials appointed a committee to make a study of the classification of coals. In 1934 this Committee published certain 'Tentative Specifications for Classification of Coals by Rank'. Changes were made in the tentative standards in 1935 and in 1936. During the week of September 20, 1937, the tentative standards were given final approval by the Committee.

"The A. S. T. M. formula classifies coal by rank according to fixed carbon and calorific value calculated on a mineral-matter-free basis. Under this formula the highest ranking anthracite is metaanthracite, then anthracite, then semianthracite. Immediately below semianthracite is low volatile bituminous, which is the highest ranking bituminous. Semianthracite is defined as non-agglomerating coal with a fixed carbon content of between 86 and 92 per cent calculated on a dry mineral-matter-free basis. Low volatile bituminous is coal having a fixed carbon content of between 78 and 86 per cent calculated on a dry-mineral-matter-free basis. There is no such classification as semibituminous.

"It is true that under this formula, petitioner's coal would fall in the semianthracite class. Analyses of coal taken from petitioner's mine show that its fixed carbon content ranges from 86.39 to 88.04 per cent. It is just over the line between low volatile bituminous and semianthracite, almost in what might be called the twilight zone between the two.

"If the A. S. T. M. standard is controlling in the situation here presented, it can only be because Congress so intended. The Bituminous Coal Act of 1937 makes no mention of the A. S. T. M. standards. The tentative standards were first announced in 1934 and were widely accepted. Congress was either aware or unaware of the existence of such standards when it passed the Act. If it was unaware of them, it obviously could not have intended them to be controlling. If Congress was aware of the existence of the A. S. T. M. standards, the fact that it adopted an entirely different classification indicates that it did not enact that [fol. 47] particular formula into law. The statute refers to only three kinds of bituminous coals, bituminous, semibituminous, and subbituminous; the word 'semibituminous' was used to describe the highest grade of bituminous coal. The A. S. T. M. classifies bituminous as low volatile bituminous, medium volatile bituminous, high volatile A bituminous, high volatile B bituminous, high volatile C bituminous, subbituminous, A, subbituminous B and subbituminous C. It makes no mention of any such coal as 'semibituminous.' If Congress had intended the A. S. T. M. standards to govern it would either have expressly so provided, or indicated.

"That Congress did not have the A. S. T. M. classification in mind is further indicated when we consider the definition of lignite. Section 17 (b) provides that lignite shall be excluded from the Act and defines it as a lignitic coal having calorific value in British thermal units of less than seven thousand six hundred per pound and having a natural moisture content in place in the mine of 30 per cent or more. The A. S. T. M. classification defines lignite as a coal having less than eighty-three hundred moist British thermal units. Thus, even where Congress adopted a scientific test, it used one that differed from that adopted by A. S. T. M.

"But the American Society for Testing Materials is not an official body. It is not subject to governmental control. It has a constantly shifting membership. It may change its standards from day to day, from year to year. It has in fact made some changes in its standards in each of the years since the tentative standards were first put forth in 1934. Two such changes directly affecting petitioner's coal were (1) the change from the agglutinating test to the agglomerating test for anthracite, and (2) the change in the specification for low volatile bituminous from a range of

14 to 23 per cent of volatile matter to a range of 14 to 22 per cent. Changes of even greater significance might have been made had the Society seen fit to do so. Thus, coal which is subject to the provisions of the Act on one day may be entirely free from either regulation or tax the next because of the decision of a private organization in no way interested in or concerned with the effect of their determination on the administration of the Act. Irrespective of any question of the propriety of the delegation of legislative power were the Act so construed, there is every reason for avoiding a construction so plainly out of harmony with orderly administration of law.

"We should like to point out that we have no quarrel with the method of classification adopted by A. S. T. M. It is a good method. It is entitled to weight in arriving at a definition of terms. But it is only one of many factors that must be considered. And where on every other basis except chemical analysis a coal more nearly resembles bituminous than anthracite, and where the exclusion of such coal from the provisions of the Act would give its producers an unfair competitive advantage over neighboring producers and tend to break down the orderly administration of the statute, the determination of the Commission that such coal comes under the Act was clearly justified.

"What was said by the Supreme Court with reference to the Transportation Act of 1920 in *Piedmont & Northern Railway Co. v. Interstate Commerce Commission*, 286 U. S. 299, is peculiarly appropriate here. The Court said, at p. 311:

"The Transportation Act was remedial legislation and should therefore be given a liberal interpretation; but for the same reason exemptions from its sweep should be narrowed and limited to effect the remedy intended."

"If the Commission was authorized to consider other factors than chemical analysis in arriving at its determination, there was ample evidence, as we have already pointed out, to sustain its findings. The classification of coals is a subject requiring a specialized knowledge of the coal industry. In such a field the findings of a Commission specially created for that purpose should not be lightly disturbed on appeal.

"Petitioner makes the suggestion in its brief that Congress intended the word semibituminous to describe a grade

of coal of a rank lower than bituminous. Such a definition is at variance with the dictionary definition of the word. Webster's New International Dictionary 1933. It is also at variance with the uncontradicted evidence in the record. All of the witnesses who testified with respect to it agreed that semibituminous was a higher grade than bituminous and semianthracite a lower grade than anthracite.

[fol. 49] "Petitioner also argues that the findings of the Commission should be set aside because hearsay and other irrelevant testimony was introduced at the hearing. To this contention there are two answers.

"First. Petitioner offered no objection to the introduction of this evidence. Section 6 (b) of the Act provides that no objection to an order of the Commission shall be considered by the Court on appeal unless the objection shall have been urged below. The failure to object at the hearing before the examiner precludes petitioner from raising such objection here.

"Second. The fact that incompetent or irrelevant evidence got into the record is immaterial if there was competent evidence in the record to sustain the findings. This follows from the language of Section 6 (b), which provides, that the findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. In disposing of a similar contention in *Consolidated Edison Co. v. National Labor Relations Board*, 59 Sup. Ct. 206, 217, (305 U. S. 197), the Supreme Court said:

"The companies urge that the Board received "remote hearsay" and "mere rumor." The statute provides that "the rules of evidence prevailing in courts of law and equity shall not be controlling." The obvious purpose of this and similar provisions is to free administrative boards from the compulsion of technical rules so that the mere admission of matter which would be deemed incompetent in judicial proceedings would not invalidate the administrative order. *Interstate Commerce Commission v. Baird*, 194 U. S. 25, 44; *Interstate Commerce Commission v. Louisville & Nashville R. R. Co.*, 227 U. S. 88, 93; *United States v. Abilene & Southern Ry. Co.*, 265 U. S. 274, 288; *Tagg Bros. & Moorhead v. United States*, 280 U. S. 420, 442."

"In that case the Court found from an examination of the record that it contained substantial evidence to support

the Board's findings. The rest was disregarded. We have already demonstrated that there is ample competent evidence in the record in this case to sustain the Commission. If there be some evidence in the record that would not be strictly admissible in a judicial proceeding, it is immaterial. [fol. 50] "We do not mean to indicate by the above statement that the Commission might not properly consider evidence that would not be admissible in a court of law under a strict application of the rules of evidence. The same rules of evidence plainly do not apply under the more flexible administrative procedure. But in view of the amount of judicially competent evidence supporting the Commission's determination, we do not feel it necessary to rely on any other testimony or to argue as to its admissibility."

We think the position of the Commission is sustained by the foregoing considerations and that its findings were based on substantial evidence appearing in the record.

We also sustain the claim of the Commission that its findings were appropriate to the testimony and the questions presented. In its opinion, the Commission found:

"(1) That petitioner's mine is in the Spadra field in the Hartshorne seam in Arkansas and that its coal competes with bituminous coals from other fields in the district.

"(2) That petitioner's coal is similar in structure and appearance to high grade bituminous coals from other fields such as Pocahontas from West Virginia; that in the manner of mining and in its burning characteristics it is similar to bituminous and unlike anthracite; that the miners are paid on the basis of the bituminous wage scale which is lower than the anthracite wage scale; that Spadra coals compete in the same consuming markets with the coals of adjoining producers and with high grade bituminous coals from West Virginia, but are not competitive with Pennsylvania anthracite.

"(3) That the great weight of the expert testimony is to the effect that all Spadra coal is bituminous.

"(4) That approximately 98 per cent of petitioner's production is exported from Arkansas."

After considering and disposing of petitioner's contention that the method of classification of coals by rank pro-

mulgated by the American Society for Testing Materials is controlling, the Commission goes on to state:

"The evidence in the record herein shows that the coals of petitioner and intervenors fall short of the description [fol. 51] of anthracite and clearly come within the definition of bituminous as the two coals are distinguished and defined in the Heisler case, *supra*.

"While the chemical analysis, including the proper fuel ratio, is an important element to be considered, other necessary factors for a proper ranking of coals are physical features or structure and burning characteristics. This Commission, and the former Commission, found it impossible to classify coals upon chemical analysis alone, and since the contention of the petitioner and intervenors stands solely upon chemical analysis, and because of other reasons herein stated, their petition must fall.

"To achieve the broad social and economic objectives of the Act, and to place the administration thereof upon a practical basis, we must consider not only chemical analyses, physical structure, and burning characteristics, but also competitive market conditions, uses, and historical circumstances.

"For all practical purposes, the coals produced from the Hartshorne Seam, including the Spadra and adjoining fields and the coals of the petitioner and intervenors, are the same as the coals of their competitors and all is bituminous coal as contemplated in Section 17 (b) of the Act and we so hold."

It is clear from the above language that the basis of the Commission's decision is that chemical analysis, while important, is not the sole criterion and that other important considerations are the physical structure, burning characteristics, competitive marketing conditions and uses, and historical circumstances. It was on the basis of all these criteria that the Commission reached the conclusion that petitioner's coal is subject to the Act.

In conjunction with the findings and orders, the Commission rendered its opinion (Docket 68 F. D. August 31, 1938)

in which it summarized the facts found by it and analyzed and discussed the evidence before it and referred to the court decisions upon which it relied in reaching its conclusions of law.

It appeared to the Commission that Congress had not defined the coals intended to be regulated by the Bituminous Coal Act with such absolute particularity as to leave no [fol. 52] room for construction in order to arrive at the true legislative intent. The Commission could not therefore establish "what is bituminous coal" for all cases. It considered the legislative history and the manifest object and purposes of the Act as disclosed in the "Declaration" and several provisions thereof. Its conclusion that the intent of the Act was to exclude from its operation "anthracite" and "lignitic" coals, and that such coals as those produced in Arkansas were within the Act was fully justified.

We are not persuaded that the Commission failed to find the basic facts necessary to the determination that the coal produced by petitioner was bituminous coal within the Act. The Commission was not required to draw a hard and fast line that would be applicable to all future cases in all conceivable circumstances. It found the basic facts applicable to the situation before it and rested its conclusion thereon. That is all that is required of findings of fact made by administrative agencies.

The Supreme Court on occasion has sent cases back to the trial courts because of the failure of such courts to make sufficiently detailed findings of fact. See *Interstate Circuit v. United States*, 304 U. S. 55. We know of no case where the Court has refused to pass upon the merits because the findings of fact were too detailed. The most that can be said against the Commission's findings is that they are possibly more detailed than was necessary. Such a defect is not one that caused any injury to the petitioner. As long as the necessary findings are there, the rest can be treated as mere surplusage.

We find that the petitioner was accorded a full, fair and impartial hearing by the Commission, that there was no procedure taken prejudicial to it, that the findings were based on substantial evidence, and that the orders complained of were within the Commission's jurisdiction.

Affirmed.

[fol. 53] IN UNITED STATES CIRCUIT COURT OF APPEALS,
EIGHTH CIRCUIT

No. 421, Original

SUNSHINE ANTHRACITE COAL COMPANY, Petitioner,

VS.

NATIONAL BITUMINOUS COAL COMMISSION

On Petition to Review Order of National Bituminous Coal
Commission

DECREE—June 19, 1939

This matter came on to be heard on the petition for the review of an order of the National Bituminous Coal Commission by which it was determined that the underlying coal in certain counties of Arkansas is bituminous coal within the meaning of the Bituminous Coal Act of April 26, 1937 (15 U. S. C. A. 829 et seq.), and by which the petitioner's coal was denied exemption from the operation and effect of the Act, and was argued by counsel.

On Consideration Whereof, It is now here ordered, adjudged and decreed by this Court that the order of the said National Bituminous Coal Commission in this cause, be, and the same is hereby, affirmed, without the taxation of costs in favor of either of the parties in this Court.

June 19, 1939.

[fol. 54] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE EIGHTH CIRCUIT

[Title omitted]

PETITION FOR REHEARING—Filed June 28, 1939

Comes now the petitioner in the above-entitled cause and respectfully requests that said cause be reheard and reconsidered for the reasons hereinafter stated.

1. Petitioner respectfully shows to the Court that, as appears from the opinion of the court and the record on which this cause was heard—

(a) The court in its opinion has inadvertently overlooked material matters of law which, if considered, would doubtless affect the decision in the above-entitled cause.

(b) The court in its opinion has decided a new question of federal law, to wit, the construction of the National Bituminous Coal Act of 1937 as to jurisdiction in its hearings. This presents a question of general interest to the public and should be settled, and petitioner respectfully represents that in its opinion the court has decided said question in a way probably untenable.

(c) The court in its opinion has apparently inadvertently overlooked material matters of fact appearing on the record, which, if considered, would probably affect the decision in the above-entitled cause.

In pointing out the material matters, both of law and fact, which we think have been inadvertently overlooked by the court in its opinion, we shall discuss these matters in the order in which they appear in the opinion as nearly as may be convenient.

"2. The court in its opinion (page 3) inadvertently, we think, makes the statement, "This evidence tended to show the term "Anthracite Coal" had come to be identified in the trade as "Pennsylvania Anthracite." This statement is evidently taken from the brief of the respondent, and petitioner would respectfully represent to the Court that the record in this cause is entirely devoid of any evidence endeavoring to establish a trade practice or custom giving to the term "Anthracite" the meaning of "Pennsylvania Anthracite." As a matter of fact, the record clearly discloses that the United States Department of the Interior, Geological Survey, as early as 1922 listed under the heading "Anthracite of Various Kinds," anthracite from the States of Arkansas and Colorado (R. Vol. 1, page 159); that the Department of Commerce, Bureau of Census, in its census of business 1935, in co-operation with the Bureau of Mines, listed anthracite and semi-anthracite coal in Arkansas, Colorado, Virginia and New Mexico (R. Vol. 1, page 52); and the Market Statistical Unit of the respondent, National Bituminous Coal Commission, on September 30, 1937, and again on October 2, 1937, issued a bulletin listing semi-anthracite coal in Johnson County, Arkansas (R. Vol. 2, pages

147 and 142) (*Carter v. Liquid Carbonic Pacific Corporation*, 97 Fed. [2d], page 1. [C. C. A. 9]).

3. The court in its opinion (page 4) inadvertently, apparently, states as a fact that the evidence showed that there were at least sixteen different methods of classification of coals by rank, on the basis of chemical analysis. Petitioner would respectfully show to the Court that the only evidence in the record on this subject is the evidence of Mr. L. N. Plein, and this statement is apparently taken from his testimony (R. Vol. 2, page 400). The court apparently inadvertently overlooked the further evidence of the same witness to the effect that these were classifications in use previous to the adoption of the American Society for Testing Materials classification, but that since the adoption of the American Society for Testing Materials classification there is now in use and being used only one system of classification, and that is the system of the American Society for Testing Materials (R. Vol. 2, pages 376-381 and 451-452).

4. The absolutely unwarranted assumption of the proof of an established meaning in the trade of the word "Anthracite" seems to be the basis for the court's approval of the finding of facts of the Commission. "Pennsylvania Anthracite" and "Pocahontas" seem to be used in the opinion as a standard for measuring all other coals, and we respectfully submit that there is no evidence in the record which definitely classifies either anthracite coal or Pocahontas coal, save and except according to the classification standard of the American Society for Testing Materials (R. Vol. 2, page 399). The case of *Heisler v. Thomas Collieries Company*, 260 U. S. 245, fixes no standard for classification [fol. 57] of coal. This case was decided in the year 1922, prior to the time when classification of coal had been reduced to a science. The only question presented in this case was the general classification between admittedly Anthracite and Bituminous. No question of the different grades of both Anthracite and Bituminous was presented, but the court did recognize that there were subgrades of both. Consequently no question of classification of coal by rank was there involved and could not be controlling in this cause.

5. The court in its opinion (page 8) holds that the jurisdiction of the Commission to hold the hearing in the instant case was conferred by Section 2 (a) and 4-A (U. S. C. A. 15

[829 (a)—U. S. C. A. 15-834] of the Bituminous Coal Act. Section 2 (a) is a general grant of power to the Commission to adopt reasonable rules and regulations for carrying out the provisions of the act. It seems to us that no question of rules or regulations is here involved. The Commission promulgated Order No. 28, which is not a rule or regulation, but a method for presenting certain matters to the Commission for determination. If some additional provision of the law does not authorize such hearing and determination, the promulgation of this order could add nothing to the power of the Commission. (*Interstate Commerce Commission v. Cincinnati, N. O. & T. P. Railroad*, 167 U. S. 479; *Texas & Pacific Railroad Co. v. U. S.*, 269 U. S. 627.)

Section 4-A makes provision for exemption in two instances only: (1) from the provisions of section 4 of the act. Section 4 of the act is designated in the act itself as the Bituminous Coal Code, and by two specific provisions its application is limited to code members, and code members only. (2) Or to the provisions of the first paragraph of section 4-A. The provision of the first paragraph of Section 4-A relates solely to intrastate coal and is not involved in these [fol. 58] proceedings. Obviously, a non-code member is not subject to the provisions of the code contained in section 4, and it would seem apparent that the intent was to permit those who were subject to the provisions of the code contained in section 4 to ask and obtain exemption, as those producers not subject to section 4 could gain nothing by such exemption. The same situation exists as to the use of the words "ascertainable tonnage" (page 8) in section 4, part 2, sub-section (a) [U. S. C. A. 15-833 (a)]. This is limited by the specific provisions of the code to code members only. [U. S. C. A. 15, Section 833.] The case of *Utah Fuel Company v. National Bituminous Coal Commission* does not hold otherwise. The only question presented and decided in the *Utah Fuel Company* case was the meaning of the word "producers" as used in section 10-A (U. S. C. A. 15, Section 940), and this decision did not fix nor establish the meaning of the word "producer" when used in other contexts. For illustration, the Bituminous Coal Act provides as a part of the Bituminous Coal code that minimum prices shall be just and equitable as between producers within the district. [U. S. C. A. 15-833 (a)] Obviously, the word "producers" as used in this connection was never intended to have reference to non-code producers.

6. The court in its opinion (page 20) has taken the evidence as epitomized in the brief of respondent. There are naturally omissions, and we will hereinafter refer as briefly as possible to omissions of what we consider material evidence. The court in its opinion (page 31) and the respondent in its brief concedes that the classification of coals is a subject requiring a specialized knowledge of the industry. As a matter of fact, we feel that the Court should take judicial knowledge of the fact that the classification of coals is a science in a highly specialized field, and necessitates expert evidence. In the case of *Aetna Life Insurance Company of Hartford, Connecticut, v. Mary C. Kelley*, 70 Fed. (2d) 589, this Court quoted with approval the following language:

"So may a nonexpert give his opinion in a great variety of cases when the facts known to him, and to which he would be competent to testify, would furnish no predicate whatever for the opinion of an expert witness. As a rule, such are confined to questions of identity, and such matters, as may be open to the senses, but incapable of exact description. Thus a nonexpert 'may testify that a person appeared to be suffering, was weak and helpless, appeared sick, looked pale or paler than usual, or was declining in health.' "

And this Court, speaking through Circuit Judge Van Valkenburgh in the above case, used the following language:

"The case, therefore, must be one where the fact in issue is 'open to the senses.' "

"Undoubtedly many cases may be found where the testimony of expert witnesses is held to be advisory merely, especially where there is direct proof of facts within the judgment of a nonexpert; and where lay witnesses have been permitted to testify concerning injuries sufficiently apparent to the untrained eye As the matter was left, too little importance was attached to the expert testimony offered, and, by comparison, too great effect was indirectly given to the lay testimony on a phase of the controversy upon which it could have no substantial probative value."

The question of classification of coals being in the field of science, there must be some substantial evidence from ex-

perts in that field as a basis for any finding as to classification. The evidence set forth in the court's opinion falls far short of classifying the witnesses quoted as experts in the [fol. 60] classification of coal. Mr. H. W. Collier specifically testified that he was not a geologist (R. Vol. 2, page 253.) Mr. Heber Denman specifically testified that his classification was based entirely upon excerpts he had read on the fuel ratio of coal, and that the fuel ratio was the system of classification that he had chosen. (R. Vol. 2, page 314.) Mr. Bramlette testified that the rank of coal is determined by its analysis and that he does not know what the term "semi-bituminous coal" means. (R. Vol. 2, page 349.) Mr. Puterbaugh made no pretense at qualifying as an expert in coal classification, and testified that he had never been called upon to classify the Spadra coal technically. (R. Vol. 2, page 442.) Mr. Young and Mr. Fowler had had practical experience in the mining of coal, but no study or experience in the classification of coal. The court in its opinion and the respondent in its brief have completely overlooked the technical testimony of Mr. L. N. Plein. Mr. Plein graduated from Columbia College with a degree of Bachelor of Arts and Engineer of Mines in 1921; worked a short time in the actual operation of mining property; went with the United States Bureau of Mines in 1925, and has since that time devoted his life and his energies to a technical study of coals, including their classification. (R. Vol. 2, pages 368-369.) He testified to the history of the study of the classification of coal, and named the various methods of classification in use prior to the year 1927 (R. Vol. 2, pages 379-380-381); to the history of the development of the classification by the American Society for Testing Materials; that said committee adopted a tentative standard for the classification of coal in 1934, and made two minor changes in the tentative standard in 1936 (R. Vol. 2, page 389); that the standard was changed from nonagglutinating to nonagglomerating at that time for the reason that the nonagglutinating test was not reliable (R. Vol. 2, page 389); that the United States [fol. 61] Bureau of Mines plotted anthracite coal from Sullivan County, Pennsylvania, and from Arkansas and Virginia (R. Vol. 2, pp. 396-397); that Pocahontas coals are semi-bituminous coals by the American Society for Testing Materials method generally recognized (R. Vol. 2, page 399); that semi-bituminous is sometimes called low volatile bituminous (R. Vol. 2, page 400); that there have been in the

past many ideas on classification of coal which the committee attempted to boil down to something short and complete which can classify coals on simple test (R. Vol. 2, page 401); that the only method of classification being used and recognized today is the American Society for Testing Materials (R. Vol. 2, pages 451-452) that samples of Arkansas coal showed to be 86 per cent fixed carbon and were considered as semi-anthracite (R. Vol. 2, page 402); that in the classification of coal he has to go by both the physical and chemical characteristics of coal to determine what rank it should fall in (R. Vol. 2, page 403); that you cannot classify coal from physical characteristics; that some bituminous coals are just as hard as Pennsylvania Anthracite (R. Vol. 2, page 405); that he cannot classify Exhibits 2 to 6 (samples of coal) and put into groups because he has not sufficient evidence (R. Vol. 2, page 405); that the analyses of coals which have been submitted showed the coal classified under the A. S. T. M. method as semi-anthracite (R. Vol. 2, page 411); that he could not say whether or not coal Exhibits 2 to 6 were anthracite or semi-anthracite from looking at them (R. Vol. 2, page 409).

In our view of the law, Mr. Plein, a totally disinterested party, and an employee of the respondent herein, was the only witness produced before the Commission qualified as an expert in the classification of coal, and the obvious failure on the part of the Commission to give consideration to his testimony, we most respectfully represent, was in itself [fol. 62] patently arbitrary and unreasonable. It is our belief that under the law governing expert testimony, his was the only substantial evidence having probative value as to the classification of coal.

7. The court in its opinion seemingly holds (page 29) that Congress did not have in mind at the time of the passage of the Bituminous Coal Act of 1937, the American Society for Testing Materials classification. The record discloses that other governmental departments were aware of and had in mind the A. S. T. M. classification; that the Bureau of Mines, the Geological Survey and the Department of Commerce all had, prior to the enactment of this law, issued bulletins classifying coal on that basis; Congress under the law itself uses chemical analysis for the purpose of exempting lignite. This would in and of itself seem to be

indisputable evidence that Congress had in mind some definite method of classification when it defined the term "coal" as used in the act as being "bituminous, semi-bituminous and sub-bituminous." The record discloses that the above terms are capable of definite determination. Obviously, a certain standard for the classification of coals would be more conducive to the orderly administration of the act than an uncertain standard left entirely to the discretion of an administrative commission. Otherwise, various departments of the Government, other than the Commission, dealing with the coal industry, will be dealing on an entirely different standard of classification than the Coal Commission.

8. The court in its opinion apparently assumes (page 25) that this Commission and the former commission found it impossible to classify coals upon chemical analyses alone. The court in its opinion has apparently overlooked a decision of the former commission, of which this Court may take judicial knowledge (*Lyons Milling Co. v. Goffe & [fol. 63] Cakener*, 46 Fed. [2d] 241-246), and which was called to the court's attention at the time of the argument, said decision being in the case of Anthracite Coal and Briquetting Corporation, petitioner, before the United States Department of the Interior, National Bituminous Coal Commission, and being Docket No. 34, said opinion being dated the 13th day of April, 1936, and in which said opinion the then existing Coal Commission approved the use of the American Society for Testing Materials Classification method, and in their findings 15 and 16 found as follows:

XV

"Under the formula adopted by the Technical Committee for the classification of coal, all of said analyses disclose a fixed carbon content on a dry mineral-free basis of more than 86 per cent and less than 92 per cent, with an approximate average of 88 per cent.

XVI

"All of said samples have been subjected to the agglomerating test by the Bureau of Mines and have been found to be nonagglomerating."

And the Commission, upon said finding, stated its conclusion of law as follows:

I

"That portion of the Langhorne bed which underlies the Empire mine operated by the petitioner and more fully described in finding of fact No. 4 is semi-anthracite coal and not bituminous coal within the meaning of Section 19 of the Bituminous Coal Conservation Act of 1935."

This was a contemporaneous construction of an act by an administrative board charged with the duty of enforcing [fol. 64] the act, and as such should have great weight in determining the proper construction to be placed upon the same words in the act now under consideration. We readily concede that the construction of an act should be with the purpose of arriving at the intent of the legislators, but this intent must be arrived at by a construction of the actual language used, and the end to be accomplished cannot justify the courts in a too liberal interpretation which, to all practical intents and purposes, operates in the field of legislation.

9. The court apparently in its opinion takes into consideration the legislative history. We would respectfully suggest to the Court that this record is entirely devoid of any legislative history, and so far as we are aware, no legislative history has been called to the court's attention.

10. The court in its opinion seemingly holds that it was the intent of Congress to exclude from the operation of the act "Anthracite" and "Lignitic" (page 37). The court apparently overlooks the fact that the record discloses indisputably that we are here dealing with terms capable of exact definition. Lignite is excluded from the scope of the act by exact definition solely on the basis of chemical analysis. Obviously, Congress was aware of the classification of coals on a chemical basis. It would seem equally obvious that Congress had in mind that it had created an equally definite standard for bituminous coal. The only evidence in the record of a definite standard for the classification of coal is the A. S. T. M. standard, and the record further discloses that this is the standard used by other departments of the Government and by the Marketing Unit of the respondent, itself. Any other construction would

lead to the utmost confusion. The record discloses that [fol. 65] the Geological Survey, the Bureau of Mines, the Department of Commerce and the Marketing Division of the National Bituminous Coal Commission all use the A. S. T. M. method for classification of coal. The same coal might, under the court's opinion, be Anthracite in Virginia and Bituminous in New Mexico, fluctuating according to the changing opinion of an administrative body operating without restriction as to classification. Certainly no such intent actuated Congress.

11. The court in its opinion (pages 18, 19 and 20) seemingly holds that the hearing of the Commission's examiner was upon Commission's order for general hearing, and that petitioner could not dismiss for that reason. The court seemingly overlooks the record that this is a petition to set aside an order overruling petitioner's ex parte petition for exemption. The fact that hearing on this petition had been consolidated with the general hearing did not merge petitioner's request with a general hearing, nor with other hearings (C. J. 64, page 37, section 7). Petitioner did not appear as a party of record to the general hearing, but solely as ex parte petitioner on its own behalf. There were no adversary parties in petitioner's claim for exemption, and hence no other parties interested.

Petitioner has endeavored to limit his petition for rehearing to matters not covered in its brief. Respondent's brief was filed too late to permit of a reply brief and the time allotted for argument proved to be inadequate for a full presentation of the law and facts, and for this reason we felt impelled to go into some of these matters rather fully.

For the reasons above stated, petitioner respectfully requests that this cause be reheard and reconsidered, and that upon reconsideration, the prayer of the petitioner be [fol. 66] granted and the order entered by the National Bituminous Coal Commission overruling petitioner's petition for exemption be set aside.

Respectfully submitted, George O. Patterson, Jr.,
Henry Adamson, Attorneys for Petitioner.

Of counsel: Patterson & Patterson, Clarksville, Arkansas,
Adamson, Blair & Adamson, Terre Haute, Indiana.

Henry Adamson, one of the attorneys for petitioner herein, hereby certifies that the sole purpose of the fore-

going motion for rehearing is to call attention to material matters of law and fact inadvertently overlooked by the court, as shown by its opinion and the said motion, and that said motion is not made for the purpose of delay, but in good faith, and is believed to be meritorious.

Henry Adamson.

[File endorsement omitted.]

[fol. 67] IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER DENYING PETITION FOR REHEARING—July 8, 1939

The petition for rehearing filed by counsel for petitioner in this cause having been considered, It is now here ordered by this Court that the same, be, and it is hereby, denied.

[fol. 68] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE EIGHTH CIRCUIT

[Title omitted]

PETITION OF PETITIONER FOR STAY OF ISSUANCE OF MANDATE—
Filed July 19, 1939

Comes now the petitioner in the above entitled cause, and respectfully prays that an order be entered by this court in the above entitled cause staying the issue of the mandate in said cause until and including September 24, 1939, and thereafter until final disposition of said cause by the Supreme Court of the United States, in case on or before the above date there shall be filed with the Clerk of this court the certificate of the Clerk of said Supreme Court, as provided by Clause 3, Rule 19 of this court. And in support of this motion the said Appellant represents unto the court as follows:

1. That on or about the 19th day of June, 1939, an order and judgment was entered by this court overruling petitioner's petition to modify and set aside an order of the respondent herein, and affirming order and judgment of the respondent herein.

2. That thereafter, and within the time and in the manner prescribed by the rules of this court, this petitioner filed its petition for rehearing of said cause.

3. That afterwards, on the 8th day of July, 1939, an order and judgment was entered by this court, overruling and denying Appellant's petition for a rehearing in this cause.

4. That under the rules of this court the mandate in said [fol. 69] cause will issue on July 19, 1939, said date being ten days after the denial of said petition for rehearing.

5. That petitioner intends to file in the Supreme Court of the United States a petition for certiorari in this cause, as provided by the statutes of the United States and the Bituminous Coal Act of 1937, and in accordance with the rules of said Supreme Court of the United States, and that the said petitioner intends to file said petition for certiorari in good faith and in accordance with the statutes and rules of said Supreme Court hereinbefore mentioned.

6. That the order and judgment in the above entitled cause affirms the findings and orders of the respondent herein; presents a question of general interest to the public; a new and unsettled question of federal law, namely the construction of the federal statutes as to the powers of the National Bituminous Coal Commission; and a question of the nature and kind of evidence necessary to support the findings of an administrative board.

7. That under and by virtue of the adoption of the President's Reorganization Plan No. 2, the National Bituminous Coal Commission, respondent herein, has been and was abolished as of July 1, 1939, and its powers, duties and functions transferred to the Secretary of the Interior; that Harold L. Ickes is the duly appointed, qualified and acting Secretary of the Interior; that under and by virtue of the terms of said Reorganization Act of 1939 (Section 8(b) Reorganization Act of 1939) no suit, action or other proceeding lawfully commenced by or against the head of any agency or other officer of the United States, in his official capacity or in relation to the discharge of his official duties, shall abate by reason of any transfer of authority, power and duties from one officer or agency of the government to another under the provisions of this title, but the court, on

motion or supplemental petition filed at any time within [fol. 70] twelve months after such transfer takes effect, showing a necessity for survival of such suit, action or other proceeding to obtain a settlement of the questions involved, may allow the same to be maintained by or against the head of the agency or other officer of the United States to whom the authority, powers, and duties are transferred.

8. That the petitioner herein has prepared and will file as soon as notice may be given, motion to substitute Harold L. Ickes, Secretary of the Interior, as Respondent herein; that said substitution should be done and accomplished in this court before preparation of a certified transcript of the record herein; that by reason of the fact that this proceedings was not covered by the rules of the court, the record herein was by agreement not printed in this court, and the preparation of said record for printing and the printing thereof will involve an extraordinary and unusual length of time, and the preparation of the certified transcript of the record and the preparation of the petition for certiorari will also consume an extraordinary and unusual length of time.

Wherefore, your petitioner prays as above set forth, that the issue of the mandate of said court in said cause be stayed until and including the 24th day of September, 1939, and thereafter until the final disposition of said cause by the Supreme Court, as provided by Clause 3 of Rule 19 of this court, providing the certificate of the Clerk of the Supreme Court is filed in the office of the Clerk of this Court on or before September 24, 1939, in the manner and form as prescribed by the aforesaid rule of this Honorable Court. All of which is respectfully asked and prayed.

Sunshine Anthracite Coal Company, By Lloyd C. Adamson, Henry Adamson, Attorneys for Petitioner. Of Counsel: Patterson & Patterson, Clarks-ville, Arkansas; Adamson, Blair & Adamson, Terre Haute, Indiana.

[fol. 71]

[File endorsement omitted]

IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER STAYING ISSUANCE OF CERTIFIED COPY OF DECREE—
Filed July 24, 1939

On Consideration of the motion of petitioner for an order staying the issuance of the mandate in this matter pending a petition to the Supreme Court of the United States for a writ of certiorari, It is now here Ordered that the issuance of a certified copy of the decree of this Court to the National Bituminous Coal Commission; or its successor, be, and the same is hereby, stayed until Sept. 24, 1939, and if within the stay hereby granted there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari, record and brief have been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

Dated July 22, 1939.

Archibald K. Gardiner, U. S. Circuit Judge.

[File endorsement omitted.]

[fol. 72] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE EIGHTH CIRCUIT

[Title omitted]

PETITION TO SUBSTITUTE HAROLD L. ICKES, SECRETARY OF THE INTERIOR, AND HOWARD A. GRAY, AS DIRECTOR OF THE BITUMINOUS COAL DIVISION OF THE DEPARTMENT OF THE INTERIOR AS RESPONDENTS HEREIN—Filed Aug. 1, 1939

Comes now the Petitioner and shows to the court:

1. That under and by virtue of the adoption of the President's Reorganization Plan No. 2, the National Bituminous Coal Commission, respondent herein, has been and was abolished as of July 1, 1939, and its powers, duties and functions transferred to the Secretary of the Interior, to be administered under his direction and supervision by such division, bureau, or office in the Department of the Interior as the Secretary shall determine.

2. That Harold L. Ickes is the duly appointed, qualified and acting Secretary of the Interior, and that said Harold L. Ickes under and by virtue of said Reorganization Plan No. 2, has set up in the Department of the Interior a Bituminous Coal Division for the administering of said Bituminous Coal Act of 1937, and that Howard A. Gray is the duly appointed, qualified and acting Director of said Bituminous Coal Division of the Department of the Interior.

3. That under and by virtue of the terms of the said Reorganization Act of 1939, this cause of action does not abate. (Section 8(b) Reorganization Act 1939.)

[fol. 73] 4. That some of the questions involved in this cause of action are federal questions of first impression, are of general interest to the public and the petitioner herein is desirous of obtaining a definite and final settlement of those questions and other questions involved in this cause of action; that it is the intention of petitioner to apply to the Supreme Court of the United States as soon as reasonably can be done for a writ of certiorari for review of the decision and order in the above entitled cause of action; that in order to obtain a final decision of said question by the Supreme Court of the United States, it will be necessary that this cause of action survive and be carried forward to its final conclusion; that this petitioner is of the opinion that the substitution in the above cause of action should be ordered before preparation of the certified transcript of the record for filing with the petition for writ of certiorari.

Wherefore, Petitioner moves the court that Harold L. Ickes as Secretary of the Interior, and Howard A. Gray, as Director of the Bituminous Coal Division of the Department of the Interior, be substituted as respondents herein, and that this cause proceed in its usual course without further service of process.

Lloyd C. Adamson, Henry Adamson. Of Counsel:
Patterson & Patterson, Clarksville, Arkansas.
Adamson, Blair & Adamson, Terre Haute, Indiana.

No objection.

Robert L. Sher, Robert L. Stern, Special Assistants
to the Attorney General, Counsel for Respondents.

[File endorsement omitted.]

[fol. 74] IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER SUBSTITUTING HAROLD L. ICKES AS SECRETARY OF THE INTERIOR, AND HOWARD A. GRAY, AS DIRECTOR OF THE BITUMINOUS COAL DIVISION OF THE DEPARTMENT OF THE INTERIOR, AS RESPONDENTS—August 8, 1939.

This cause came on to be heard on the petition to substitute as respondents Harold L. Ickes as Secretary of the Interior and Howard A. Gray, as Director of the Bituminous Coal Division of the Department of the Interior, and that this cause proceed in its usual course without further service of process, and it appears that counsel for the respondents have no objection.

In pursuance of said petition, It is now here Ordered by this Court that same be, and is hereby, granted, and the requested substitution of parties respondent is hereby made.

[fol. 75] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 76] IN SUPREME COURT OF THE UNITED STATES

STIPULATION FOR DIMINUTION OF RECORD

It is hereby stipulated by and between the Solicitor General, on behalf of the respondents, and the attorney for petitioner in the above entitled cause that in order to reduce the size of the record and the cost of its printing, the Clerk of the Supreme Court in printing the record may reduce its size, as follows:

- (1) Eliminate entirely:
 - (a) List of appearances (R. I, 34).
 - (b) Exhibits 1 to 9 (R. I, 35-48).
 - (c) Exhibits 11 to 14, and documentary exhibits 7 to 11 (R. I, 50-136).
 - (d) Documentary exhibit 13 (R. I, 144).
 - (e) Documentary exhibits 15 to 18 (R. I, 144-151).
 - (f) Letter (R. I, 156-157).
 - (g) Circular (R. I, 160).
 - (h) All material on R. I, 173-175.

(i) Affidavit (R. I, 245).

[fol. 77] (j) Argument, etc., on R. I, 262-270.

(k) Exceptions (R. I, 271-288).

◦ (l) Order No. 53, Order No. 28, and Order of Assignment set out at R. II, 3-11 (indicating that they are included elsewhere in the Record).

(2) Eliminate the following, but retain the heading:

(a) Petition of Diamond Anthracite Coal Company, (R. I, 11-18) retaining the following heading: Petition of Diamond Anthracite Coal Company for Exemption from the Provisions of the National Bituminous Coal Act.

(b) Petition of McKinney Coal Company (R. I, 19-25) retaining the following heading: Petition of D. A. McKinney Coal Company, a Corporation, for Exemption from the Provisions of the National Bituminous Coal Act.

(c) Exceptions of Diamond Anthracite Coal Company (R. I, 205-216) retaining the following heading: Exceptions to Report of Examiner and Brief in Support Thereof of the Diamond Anthracite Coal Company, Clarksville, Arkansas.

(d) Exceptions of D. A. McKinney Coal Company (R. I, 217-242) retaining the following heading: Exceptions to Report of Examiner and Brief in Support Thereof of the D. A. McKinney Coal Company, Clarksville, Arkansas.

In each of the above cases it should be stated that the contents of the aforementioned documents have been omitted in printing.

(3) Eliminate the affidavits of service (R. I, 28-32), substituting therefor the following:

[There have been omitted in printing affidavits-reciting that a true and correct copy of Order No. 53 was sent to the Southwestern American, Fort Smith, Arkansas, for publication; was printed in the Federal Register; was served by mail upon the district boards, consumers' counsel, government agencies, all interested persons of record on the Commission's mailing list, and upon the Sunshine Anthracite Coal Company.]

(4) Eliminate the report of the trial examiner (R. I, 177-204), retaining the heading as set forth on page 176, and also the following:

[fol. 78] [It is stipulated by the parties that the report of the trial examiner, Carman A. Newcomb, dated December 3, 1937, omitted in printing, contains findings of fact which, in so far as material, are the same in substance as findings thereafter made by the Commission. The examiner recom-

mended that the Commission enter an order declaring all coals produced in the state of Arkansas to be bituminous coal and subject to the provisions of the Bituminous Coal Act of 1937, and enter a further order denying the application for exemption filed by the Sunshine Anthracite Coal Company. The attorney for Sunshine Anthracite Coal Company acknowledged receipt of this report under date of January 28, 1938.]

(5) Eliminate affidavit on R. I, 254, and insert at the end of R. I, 255, the following:

[Affidavit showing service on petitioner has been omitted.]

(6) Eliminate the affidavits and notices on R. I, 291-298, substituting the following:

[There have been omitted in printing the affidavit of proof of publication of the above notice in the Federal Register; a notice of continuance of oral argument, and affidavit of proof of publication thereof in the Federal Register; and a further notice setting the date for oral argument on June 24, 1938, together with affidavits of proof of service thereof and publication thereof in the Federal Register.]

Star Bldg., Terre Haute, Indiana.

Henry Adamson, Attorney for Petitioner. N. A.
Townsend, Acting Solicitor General.

Dated this 30 day of August 1939.

Endorsed on Cover: File No. 44,211. E. Arkansas, D. C. U. S., Term No. 804. The Sunshine Anthracite Coal Company, Appellant, vs. Homer M. Adkins, as Collector of Internal Revenue for the District of Arkansas. Filed March 12, 1940. Term No. 804 O. T. 1939.

FILE COPY

MAR 13 1939

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 804

THE SUNSHINE ANTHRACITE COAL COMPANY,
Appellant,

vs.

HOMER M. ADKINS, AS COLLECTOR OF INTERNAL REVENUE
FOR THE DISTRICT OF ARKANSAS.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE EASTERN DISTRICT OF ARKANSAS.

STATEMENT AS TO JURISDICTION.

HENRY ADAMSON,
GEORGE O. PATTERSON,
Counsel for Appellant.

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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DIVISION OF ARKANSAS.
WESTERN DIVISION

Equity Action No. 2949.

THE SUNSHINE ANTHRACITE COAL COMPANY,
Plaintiff,

vs.

HOMER M. ADKINS, AS COLLECTOR OF INTERNAL REVENUE
FOR THE DISTRICT OF ARKANSAS:

Defendant.

Before the Honorable, Joseph W. Woodrough, Circuit Judge; Thomas C. Trimble and Harry J. Lemley, District Judges, Composing the Court Consisting of Three Judges Under Section 380(a) of Title 28 of the United States Code Annotated (Act of August 24, 1937, Chapter 754, 50 Statutes 751).

STATEMENT AS TO JURISDICTION.

The jurisdiction of the Supreme Court of the United States upon appeal is invoked under Section 3 of the Act of August 24, 1937, Chapter 754, 50 Statutes 751 (United States Code Annotated, Title 28, Section 380 (a)). The final decree of the three-judge District Court was entered February 16, 1940. Application for appeal is herewith pre-

sented on the 4th day of March, 1940. The Act of Congress, the validity and construction of which is involved, is the Bituminous Coal Act of 1937, approved April 26, 1937: c. 127, 50 Statutes 72 (United States Code Annotated, Title 15, Section 828 to Section 851, inclusive).

The general purpose of the Bituminous Coal Act of 1937 was to stabilize the bituminous coal industry. Section 1 is a statement of the purposes of the act. Section 2 establishes the National Bituminous Coal Commission and prescribes its powers and duties, and contains, among other provisions, the following:

"Such Commission shall have power to make and promulgate all reasonable rules and regulations for carrying out the provisions of this act, and shall annually make full report of its activities to the Secretary of the Interior for transmission to Congress. A majority of the Commission shall constitute a quorum for the transaction of business, and a vacancy in the Commission shall not impair the right of the remaining members to exercise all the power of the Commission. No order which is subject to judicial review under Section 6, and no rule or regulation which has the force or effect of law, shall be made or prescribed by the Commission, unless it has given reasonable public notice of a hearing, and unless it has afforded to interested parties an opportunity to be heard, and unless it has made findings of fact. Such findings, if supported by substantial evidence, shall be conclusive upon review thereof by any court of the United States."

(The President, by his Reorganization Plan No. 2 as of July 1, 1939, abolished the National Bituminous Coal Commission and transferred all of its powers, duties and functions to the Secretary of the Interior, to be administered under his direction and supervision by such division, bureau or office in the Department of the Interior as the Secretary might determine.) This section also provides for the ap-

pointment of a Consumers' Counsel and fixes its powers and duties. Section 3 of the Act is designated "Tax on Coal" and in paragraph (a) of Section 3 imposes a tax of one cent per ton of two thousand pounds on the sale or other disposal of bituminous coal. Section 3 of the Act then proceeds as follows:

(b) In addition to the tax imposed by subsection (a) of this section, there is hereby imposed upon the sale or other disposal of bituminous coal produced within the United States, when sold or otherwise disposed of by the producer thereof, which would be subject to the application of the conditions and provisions of the code provided for in section 4, or of the provisions of section 4-A, an excise tax in an amount equal to $19\frac{1}{2}$ per centum of the sale price at the mine in the case of coal disposed of by sale at the mine, or in the case of coal disposed of otherwise than by sale at the mine, and coal sold otherwise than through an arms' length transaction, $19\frac{1}{2}$ per centum of the fair market value of such coal at the time of such disposal or sale. In the case of any producer who is a code member as provided in section 4 and is so certified to the Commissioner of Internal Revenue by the Commission, the sale or disposal by such producer during the continuance of his membership in the code of coal produced by him shall be exempt from the tax imposed by this subsection.

(c) The taxes imposed by this section shall be paid to the United States by the producer, and shall be payable monthly for each calendar month on or before the first business day of the second succeeding month, under such regulations and in such manner as shall be prescribed by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury.

(d) In the case of coal disposed of otherwise than by sale at the mine, and coal sold otherwise than through an arms' length transaction, the Commissioner of

Internal Revenue shall determine the market value thereof. Such market value shall equal the current market price at the mine of coal of a comparable kind, quality, and size produced for market in the locality where the coal so disposed of is produced.

(e) The tax imposed by subsection (a) of this section shall not apply in the case of a sale of coal for the exclusive use of the United States or of any State or Territory of the United States or the District of Columbia, or any political subdivision of any of them, for use in the performance of governmental functions. Under regulations prescribed by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury, a credit against the tax imposed by subsection (a) of this section or a refund may be allowed or made to any producer of coal in the amount of such tax paid with respect to the sale of coal to any vendee, if the producer has in his possession such evidence as the regulations may prescribe that such coal was resold by any person for the exclusive use of the United States or of any State, Territory of the United States, or the District of Columbia, or any political subdivision of any of them, for use in the performance of governmental functions.

(f) No producer shall, by reason of his acceptance of the code provided for in section 4, or of the exemption from the tax provided in subsection (b) in this section, be held to be precluded or estopped from contesting the constitutionality of any provision of this Act or of the code, or the validity or application of either to him or to any part of the coal produced by him.

Section 4 of the Act is designated "Bituminous Coal Code," and the first three paragraphs of said section read as follows:

Sec. 4. The provisions of this section shall be promulgated by the Commission as the "Bituminous Coal Code", and are herein referred to as the code.

Producers accepting membership in the code as provided in section 5 (a) shall be, and are herein referred to as, code members, and the provisions of such code shall apply only to such code members, except as otherwise provided by subsection (h) of part II of this section.

For the purpose of carrying out the declared policy of this Act, the code shall contain the following conditions and provisions, which are intended to regulate interstate commerce in bituminous coal and which shall be applicable only to matters and transactions in or directly affecting interstate commerce in bituminous coal.

Section 4, Part I is designated "Organization", and provides method for organization of district boards and prescribes district boards' powers and duties. Section 4, Part II is designated "Marketing", and confers upon the Commission the power and authority "to prescribe for code members minimum and maximum prices and marketing rules and regulations, as follows:" Then follow detailed provisions for proposing, determining, coordinating and establishing minimum prices by the Commission; section 4 II (i) is designated "Unfair Methods of Competition", and contains numerous practices declared to be unfair methods of competition in violation of the code. Section 4-A reads as follows:

"Whenever the Commission upon investigation instituted upon its own motion or upon petition of any code member, district board, State or political subdivision thereof, or the consumers' counsel, after hearing finds that transactions in coal in intrastate commerce by any person or in any locality cause any undue or unreasonable advantage, preference, or prejudice as between persons and localities in such commerce on the one hand and interstate commerce in coal on the other hand, or any undue, unreasonable, or unjust discrimination against interstate commerce in coal, or in any manner directly affect interstate commerce in

coal, the Commission shall by order so declare and thereafter coal sold, delivered or offered for sale in such intrastate commerce shall be subject to the provisions of section 4.

Any producer believing that any commerce in coal is not subject to the provisions of section 4 or to the provisions of the first paragraph of this section may file with the Commission an application, verified by oath or affirmation for exemption, setting forth the facts upon which such claim is based. The filing of such application in good faith shall exempt the applicant, beginning with the third day following the filing of the application, from any obligation, duty, or liability imposed by section 4 with respect to the commerce covered by the application until such time as the Commission shall act upon the application. If the Commission has reason to believe that such exemption during the period prior to action upon the application is likely to permit evasion of the Act with respect to commerce in coal properly subject to the provisions of section 4 or of the first paragraph of this section, it may suspend the exemption for a period not to exceed ten days. Within a reasonable time after the receipt of any application for exemption the Commission shall enter an order granting, or, after notice and opportunity for hearing, denying or otherwise disposing of such application. As a condition to the entry of and as a part of any order granting such application, the Commission may require the applicant to apply periodically for renewals of such order and to file such periodic reports as the Commission may find necessary or appropriate to enable it to determine whether the conditions supporting the exemption continue to exist. Any applicant aggrieved by an order denying or otherwise disposing of an application for exemption by the Commission may obtain a review of such order in the manner provided in subsection (b) of section 6."

Section 5 provides for acceptance of membership in the code, provides for filing of charges, hearing on the charges

and revocation of membership in the code and provides a method of application for reinstatement of any member whose membership has been revoked, and confers upon any code member right of action for injury to his business or property by any other code member. Section 6(a) provides for review of all rules, regulations, determinations and promulgations of any district board by the Commission, upon appeal. Section 6(b) provides as follows:

"Any person aggrieved by an order issued by the Commission in a proceeding to which such person is a party may obtain a review of such order in the Circuit Court of Appeals of the United States, within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall be forthwith served upon any member of the Commission and thereupon the Commission shall certify and file in the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, and enforce or set aside such order, in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged below. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the hearing before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Com-

mission may modify its findings as to the facts, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, and enforcing or setting aside, in whole or in part, any such order of the Commission shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

"The commencement of proceedings under this subsection shall not, unless specifically ordered by the court, operate as a stay of the Commission's order."

Section 6(c) provides for enforcement of any order of the Board against the code member by application to the Circuit Court of Appeals of the United States within any circuit where such code member resides or carries on business, and section 6(d) provides that the jurisdiction of the Circuit Court of Appeals of the United States, or of the United States Court of Appeals for the District of Columbia, as the case may be, to enforce, set aside or modify orders of the Commission shall be exclusive.

Section 7 provides for the applicability, so far as applicable and not inconsistent with the provisions of this act, of all other provisions of law, including penalties and refunds applicable in respect to the taxes imposed by Title 4 of the Revenue Act of 1932.

Section 8 authorizes administering oaths to witnesses, issuing subpoenas, and subpoenas *duces tecum* and other powers in connection with hearings and investigations.

Section 9 is a declaration of public policy with reference to collective bargaining.

Section 10 authorizes the Commission to require reports from producers and confers other general powers on the Commission.

Section 11 provides that State laws regulating mining of coal not inconsistent herewith are not affected by the act.

Section 12 provides for the creation of marketing agencies under the supervision of the National Bituminous Coal Commission.

Section 13 declares the intention that if any provision of the act or code or any section, subsection, paragraph or proviso is held invalid, the remainder of the act or code shall not be affected thereby.

Section 14 is designated "Other Duties of the Commission" and authorizes the Commission to study and investigate and report to the Secretary of the Interior for transmission by him to Congress, certain matters in connection with the coal industry.

Section 15 authorizes the correction of abuses that may grow up in connection with the code.

Section 16 authorizes the Commission or the office of the Consumers' Counsel to make complaint to the Interstate Commerce Commission with respect to rights, charges, tariffs and practices relating to transportation of coal.

Section 17 is the definition section of said Act, and reads as follows:

Sec. 17. As used in this Act—

(a) The term "coal" means bituminous coal.

(b) The term "bituminous coal" includes all bituminous, semi-bituminous, and subbituminous coal and shall exclude lignite, which is defined as a lignitic coal having calorific value in British thermal units of less

than seven thousand six hundred per pound and having a natural moisture content in place in the mine of 30 per centum or more.

(c) The term "producer" includes all individuals, firms, associations, corporations, trustees, and receivers engaged in the business of mining coal.

(d) The term "interstate commerce" means commerce among the several States and Territories, with foreign nations, and with the District of Columbia.

(e) The term "United States" when used in a geographical sense includes only the States, the Territories of Alaska and Hawaii, and the District of Columbia.

Section 18 fixes the effective date of the Act.

Section 19 fixes the expiration of the statute.

Section 20 is the repealing section and repeals the Bituminous Coal Conservation Act of 1935, appropriates money for the expense of the Board and the Consumers' Counsel, transfers the property of the National Bituminous Coal Commission and Consumers' Counsel established under the Consumers' Coal Conservation Act of 1935, to the Commission and the Consumers' Counsel established under this Act.

Section 21 provides that this act may be cited as "The Bituminous Coal Act of 1937". There then follows an annex to the act, being a schedule of districts dividing the United States into twenty-three districts.

Plaintiff, The Sunshine Anthracite Coal Company, is a corporation engaged in the business of producing and marketing coal from its mine in the Spadra coal field in Johnson County, Arkansas, and has never subscribed to nor accepted the provisions of the Bituminous Coal Code provided for in Section 4 of the Bituminous Coal Act of April 26, 1937, c. 127-75th Congress, first session, 50 Statutes, 72 et seq. (15 U. S. C. A. section 828 et seq.) On May 3,

1938, defendant herein served notice and demand on plaintiff for taxes in the amount of \$14,748.64 and on May 5, 1938, filed in the office of the Circuit Court and Recorder of Johnson County, Clarksville, Arkansas, notice of tax lien under the Internal Revenue laws in the total amount of \$15,488.62; that plaintiff on May 9, 1938, filed its bill of complaint against the defendant herein, praying for a temporary injunction suspending and restraining the assessing and collecting or attempting to assess and collect both the one cent per ton tax and the so-called 19½ per cent excise tax, and praying that upon final hearing a permanent injunction of like effect be issued and granted against the defendant.

The application for temporary injunction as well as the prayer for permanent injunction was based upon three contentions:

1. That the coal produced and marketed by the plaintiff was anthracite coal and not within the purview of the Bituminous Coal Act of 1937.
2. That the so-called 19½% tax levied by section 3 (b) of the Act was, by the terms of the act itself, applicable to code members only.
3. That said act was invalid and void in that it constitutes an unwarranted delegation of the legislative functions of the Congress of the United States; that it deprives plaintiff of its property without due process of law, in violation of the 5th amendment of the Constitution of the United States; that it constitutes an invasion by the government of the United States of America of rights and powers reserved to the several states by the 10th amendment to the Constitution of the United States; that the so-called 19½% tax is not a good faith exercise of the taxing power conferred upon Congress by Clause 1 of Section 8, Article 1 of the Constitution of the United States; that the classi-

fication is arbitrary and unreasonable; that the act attempts to levy an excise tax in violation of Article 1, Clause 1 of the Constitution of the United States, and that it is beyond the power of Congress to legislate on the business of producing and selling of bituminous coal as the business is a private one and not affected with the public interest; that on June 3, 1938, before a properly constituted three-judge statutory court, hearing on temporary injunction was held and temporary injunction issued restraining the assessment and collection or attempt to collect the taxes levied under section 3(b) of the Bituminous Coal Act of 1937. The defendant by his answer and on the trial, insisted that the enactment of the Bituminous Coal Act of 1937 was a proper exercise of the powers of Congress; that it was neither arbitrary, unreasonable nor capricious, and that it was in all respects a valid and constitutional enactment and was applicable to coal produced by this plaintiff; and that the 19½ per cent tax levied by section 3(b) was applicable to the coal produced by this plaintiff. Defendant also set up as an answer in bar on the question of whether or not plaintiff's coal came within the purview of the statute, proceedings, findings and order or decree entered on hearing of petition for exemption and general investigation of coals in the Sprada coal field, Johnson County, Arkansas, had and held before the National Bituminous Coal Commission determining that coal produced by plaintiff and by all producers in the Sprada field was bituminous coal within the meaning of the act; plaintiff filed a motion to strike out all of that portion of the answer setting up and alleging the above proceedings as an answer in bar, which said motion to strike was overruled by the three-judge court, and the court in an opinion filed at that time, copy of which is hereto appended, held that the proceedings before the National Bituminous Coal Commission

were conclusive on this Court in this hearing, and denied plaintiff's right to a trial *de novo* on such question.

Final hearing on the merits for permanent injunction was had and held at Little Rock, Arkansas, before the Honorables Joseph W. Woodrough, Circuit Judge, Thomas C. Trimble and Harry J. Lemley, District Judges; that said final hearing of said three-judge court excluded all evidence offered by plaintiff as to nature of characteristics of plaintiff's coal, technical meaning and prior construction by other departments and former coal commissions of the words "bituminous", "semi-bituminous" and "sub-bituminous", and denied plaintiff's right to trial *de novo* both as to nature or characteristics of plaintiff's coal and technical meaning and prior construction by other departments and the former coal commission of the words "bituminous", "semi-bituminous" and "sub-bituminous" coal; on February 16, 1940, final decree was entered in said cause as follows:

"This cause having been assigned for trial on February 15, 1940, trial was had, evidence heard and arguments of counsel presented, and the Court now files herein its findings of fact and conclusions of law thereon, and the Court now renders judgment as follows:

It is hereby ordered; adjudged and decreed that the defendant be and he is hereby permanently enjoined from collecting or attempting to collect taxes and penalties laid and accrued against plaintiff by defendant under Section 3(b) of the Bituminous Coal Act of 1937, same being the tax of 19½ per centum of the sale price of plaintiff's coal, up to and including date of December 4, 1939.

It is further ordered, adjudged and decreed that as to taxes accrued or assessed against plaintiff under Section 3(b) of said Act from and after date of December 4, 1939, plaintiff's bill is without equity and the same is hereby dismissed.

It is further ordered, adjudged and decreed by the Court that notwithstanding the dismissal of said bill, the restraining order heretofore issued against defendant restraining him from collecting or attempting to collect taxes asserted against plaintiff under Section 3(b) of said Bituminous Coal Act of 1937, be and the same is hereby continued in full force and effect as to such taxes assessed and accruing from and after December 4, 1939, for the period of thirty (30) days from entry of this decree to enable plaintiff to appeal to the Supreme Court of the United States, and that if such appeal shall be perfected within said thirty (30) day period, said restraining order against the defendant shall remain in full force and effect until final disposition of said appeal by said Supreme Court of the United States; otherwise, it shall cease to be operative and shall stand revoked at the end of said thirty (30) day period.

Signed and dated at Little Rock, Arkansas, this 16th day of February, 1940."

And upon the filing of its final decree the three-judge court also filed its findings of fact and stated therein its conclusions of law as follows:

"CONCLUSIONS OF LAW.

1. This case involves a controversy arising under the Constitution and laws of the United States. The amount in controversy exceeds the sum of \$3,000 exclusive of interest and costs.

2. This Court has jurisdiction as a court of equity.

3. This Court has no jurisdiction to determine whether plaintiff's coal is "bituminous coal" as defined by the Bituminous Coal Act of 1937. Under Section 4-A and Section 6 of the Act, the findings and order of the National Bituminous Coal Commission declaring plaintiff's coal to be "bituminous coal" within the meaning of the Act was an order which the Commission had

jurisdiction to make, and which can be reviewed only by a Circuit Court of Appeals.

4. In any event, the issue whether plaintiff's coal is "bituminous coal" as defined by the Act has already been conclusively determined against plaintiff by a former proceeding in which the National Bituminous Coal Commission denied plaintiff's application for exemption from the Act. The Circuit Court of Appeals affirmed the Commission's order, and the Supreme Court denied a writ of certiorari.

5. Section 3(b) of the Act imposes a tax upon producers of bituminous coal in interstate commerce who do not subscribe to the Bituminous Coal Code.

6. The Bituminous Coal Act of 1937, C. 127, 75th Congress, 1st Session, 50 Stat. 72, is constitutional:

(a) The regulatory provisions in Section 4 are a valid exercise of the power of Congress to regulate interstate commerce and intrastate commerce directly affecting interstate commerce.

(b) The establishment of prices for bituminous coal sold in interstate commerce or intrastate commerce directly affecting interstate commerce is reasonable as is related to a proper Congressional purpose and does not violate the Fifth Amendment.

(c) The standards of the Act are sufficiently definite and the Act contains no invalid delegation of legislative authority.

(d) Whether or not the taxing provisions of Section 3(b) could be otherwise sustained, since the regulatory provisions of the Act are valid, the taxing provisions of the Act are likewise valid as affecting the valid regulatory purpose of the Act.

(e) The exemption from the tax imposed by Section 3(b) of the producers who subscribe to the Bituminous Coal Code, and are subject to the regulatory provisions of Section 4, does not constitute an arbitrary classification contravening the Fifth Amendment.

7. The bill of complaint should be dismissed."

Appeal prayed for is to the Supreme Court of the United States from the final decree dismissing plaintiff's bill of complaint, and is provided for by the Act of 1937, c. 127, 50 Statutes 72 (United States Code Annotated, Title 28, Section 380(a)). Case believed to sustain the jurisdiction of the Supreme Court of the United States is, *William Jamieson & Company, Inc. v. Henry Morgenthau, Jr., Secretary of the Treasury of the United States, et al.*, 307 U. S. 171.

Respectfully submitted,

HENRY ADAMSON,

GEORGE O. PATTERSON,

Attorneys for Plaintiff.

Copy of decision of C. C. A. 8, in case of *Sunshine Anthracite Coal Company v. National Bituminous Coal Commission*, 105 F. (2d) 559 is appended to original.

EXHIBIT "A".

**IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF ARKANSAS,
WESTERN DIVISION.**

EQUITY ACTION No. 2949..

THE SUNSHINE ANTHRACITE COAL COMPANY,
Plaintiff,
vs.

**HOMER M. ADKINS, AS COLLECTOR OF INTERNAL REVENUE
FOR THE DISTRICT OF ARKANSAS,**
Defendant.

**Before WOODROUGH, Circuit Judge, and TRIMBLE and LEMLEY,
District Judges.**

**Opinion Overruling Plaintiff's Motion to Strike Parts of
Answer and Supplementary Answer.**

This case has been submitted to the three-judge court on the motion of the plaintiff to strike out those parts of the defendant's answer and supplemental answer which set forth the proceedings of the National Bituminous Coal Commission in which it was determined by the Commission that the underlying coal in certain counties of Arkansas, including the coal produced by the plaintiff, is bituminous coal within the meaning of the Bituminous Coal Act of April

26, 1937, 15 U. S. C. S. Sec. 828 et seq. and that the plaintiff is not entitled to exemption from the operation and effect of the Act and the subsequent proceedings on the appeal from such determination to this Court, reported in 105 F. (2d) 355, and the application for and denial of certiorari by the Supreme Court November 6, 1939. The plaintiff's petition has been amended so as to include expended allegations to the effect that the coal produced by it is not bituminous coal within the meaning of Section 17 (b) of the Act, and in support of its motion it presents that it is entitled in this suit to have this Court consider its evidence in support of these allegations and render its own judgment upon the issues joined thereon. Its position is that this Court is not finally bound by the determination of the Commission or the decision of the Court of Appeals on the review in that court to find as a fact that plaintiff's coal is bituminous coal within the meaning of the Act.

This suit is in equity against the Collector of Internal Revenue to enjoin him from collecting from the plaintiff the "tax" of $19\frac{1}{2}$ per cent upon gross sales of its coal production, imposed by Section 3 of the Act against producers of bituminous coal moving in interstate commerce who do not become members of the Code. The suit is independent of the proceedings before the Commission and the appeal in the Circuit Court of Appeals, and it is an appropriate suit to test the validity as to the plaintiff of the imposition upon it of the "tax" of $19\frac{1}{2}$ per cent upon its gross sales of coal. In considering and passing upon the present motion therefore this Court will confine itself entirely to the question whether or not the status of the plaintiff, as a producer of bituminous coal within the definition of Section 17 of the Act has been finally settled against the plaintiff by the determination and decisions pleaded by defendant.

This Court's jurisdiction is that of a District Court and it is bound to follow unreversed and unmodified decision by the Circuit Court of Appeals of the circuit. When we turn to that court's opinion in *Sunshine Anthracite Coal Company v. National Bituminous Coal Commission*, we note the court's conclusion was that Congress had delegated to the Commission the jurisdiction to determine for all ad-

ministrative purposes of the Act, what coals were and what coals were not within the definitions and purview of the Act.

The issue of the Commission's jurisdiction was squarely presented by the petitioner for review which is the party plaintiff in this case, and was directly passed on and decided by the court. It was contended "that the jurisdiction of the National Bituminous Coal Commission in fixing maximum and minimum prices, rules and regulations, is limited by the Act to coal producers who have accepted the code, and that as petitioner has not become a code member the Commission is given no power to hold a hearing and determine the class or kind of coal produced from petitioner's mines." It argues that, "whether or not the coal it produces is bituminous, anthracite, semi-anthracite, lignitic or what not, is of no interest to the Commission until such time as the producer applies for membership in the code."

In answer to that contention "the Commission has rested its jurisdiction to determine whether petitioner's coal is bituminous within the meaning of the Act upon two separate and distinct bases: (1) Upon the general power of the Commission to make all reasonable rules and regulations for carrying out the provisions of the Act and (2) upon the power to grant exemptions under Section 4-A."

The court of Appeals decided the issue and said, "We, think the grounds of jurisdiction relied upon by the Commission are fully sustained." Further on in the opinion, the court said: "Here, where a determination of the character of coals in different parts of the country was a necessary incident to the performance of its other functions, the Commission was authorized to make the necessary determination." This court is bound to follow and apply the law so stated by the Circuit Court of Appeals.

But it is contended for the plaintiff, in support of the present motion, that its petition for review in the Circuit Court of Appeals was in an administrative proceeding in which such fact findings of the administrative body as were based upon substantial evidence were declared by the statute to be conclusive upon the court. The question whether plaintiff's coals are or are not bituminous is a

question of fact and plaintiff asserts a right to the independent judgment of the court as to the fact.

The answer to the contention is that the Bituminous Coal Act, in conferring powers upon the Coal Commission and prescribing the duties to be performed by it, has made the discharge of many of the Commission's duties dependent upon its first making determination of the character of the underlying coals throughout the country and of the resultant status of those who produce the coals and engage in interstate commerce therein. The determination of the character of the coals could have been made by the Congress itself, or it could delegate the power. By the terms of the Act it conferred jurisdiction on the Commission to make the determination and the procedure provided for and followed by the Commission accorded to the plaintiff a full and fair hearing and a review in the Circuit Court of Appeals which satisfied all constitutional requirements as to determination of the fact question of the plaintiff's status in respect to the administration of the Act. The nature of the fact question as it would arise in many different parts of the country practically necessitated delegation of the power to make determination to some such national body as the Coal Commission and precluded commitments to the outcome of individual law suits in many courts.

It has not been decided whether the Collector may constitutionally enforce the collection of the "tax" of 19½ per cent against the plaintiff as provided in Section 3 of the Act, but the decision of the Court of Appeals that the Commission had jurisdiction to determine, and that it had rightly determined the status of the plaintiff as a producer of bituminous coal, necessarily implied that the determination was final and conclusive in the present suit. The decision of the Supreme Court in *Shields v. Utah Idaho R. Co.*, 305 U. S. 177, permits of no other conclusion by this court.

In that case, the Utah Central Railroad Company sought to enjoin the United States District Attorney and the United States from enforcing against it certain penal statutes which were not applicable to interurban electric railways. The railroad company claimed to be exempt from the

operation of the statutes on the ground that it was an inter-urban electric railway, but in proceedings had before the Interstate Commerce Commission to which it was a party, the Commission determined that it was not. There had been no court review of the Commission's determination and the railroad company contended that it was entitled to the independent judgment of the court on the fact issue. The Circuit Court of Appeals in the Tenth Circuit, held that it was so entitled, but on appeal the Supreme Court said:

"What is the scope of the judicial review to which respondent is entitled? As Congress had constitutional authority to enact the requirements of the Railway Labor Act looking to the settlement of industrial disputes between carriers engaged in interstate commerce and their employees, and could include or except inter-urban carriers as it saw fit, no constitutional question is presented calling for the application of our decisions with respect to a trial de novo so far as the character of the respondent is concerned. With respect to that question unlike the case presented in *United States v. Idaho*, 298 U. S. 105, where the Interstate Commerce Commission was denied the authority to determine the character of the trackage in question (*Id.* p. 107), the Commission in this instance was expressly directed to make the determination. As this authority was validly conferred upon the Commission, the question on judicial review would be simply whether the Commission had acted within its authority. *Interstate Commerce Commission v. Union Pacific R. Co.*, 222 U. S. 541, 547; *Interstate Commerce Commission v. Louisville & Nashville R. Co.*, 227 U. S. 88, 91; *Virginia Railway Co. v. United States*, 272 U. S. 658, 663; *Tagg Bros. & Moorhead v. United States*, 280 U. S. 420, 444; *Florida v. United States*, 292 U. S. 1, 12; *St. Joseph Stock Yards Co. v. United States*, *supra*.

"The condition which Congress imposed was that the Commission should make its determination after hearing. There is no question that the Commission did give a hearing. Respondent appeared and the evidence

which it offered was received and considered. The sole remaining question would be whether the Commission in arriving at its determination departed from the applicable rules of law and whether its finding had a basis in substantial evidence or was arbitrary and capricious." *Id.*

It will be observed that the Supreme Court distinguished, as we must do here, between the fact question of character (or status) of the plaintiff in the suit for injunction which it had brought against the District Attorney, et al., and a question of constitutional right. We recognize fully that the plaintiff here, notwithstanding it is a producer of bituminous coal, has the right to contest payment of the 19½ per cent "tax" of Section 3 of the Act. Whether enforcement of that "tax" will or will not deprive it of constitutional rights remains to be litigated herein. But the Supreme Court has left no room to argue that this Court has jurisdiction to try *de novo* the fact question as to the status of the plaintiff under the Coal Act or the character of the coal it produces.

The Supreme Court's decision also precludes our reconsideration in this case of the evidence taken in the prior proceedings. That evidence was fully considered by the Circuit Court of Appeals and it was decided by that court that the Commission "in arriving at its determination had not departed from the applicable rules of law", and that "its findings had a basis in substantial evidence and were not arbitrary or capricious." Such is the full limit of judicial review of the fact findings of an administrative tribunal when made within the scope of its jurisdiction which the Supreme Court recognizes even in the absence of an express statute.

We think the Supreme Court's commitment to such support of administrative determinations of fact questions made within the powers lawfully delegated to them is also clearly shown in the other recent cases. *Rochester Telephone Co. v. United States*, 307 U. S. 125, 145; *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 49; *Anniston Mfg. Co. v. Davis*, 301 U. S. 337.

The Bituminous Coal Act contains the express provision Section 6 (b) (d) that where a petition to a review is filed in a Circuit Court of Appeals, the Commission shall file therein a transcript of the record and thereupon "such court shall have exclusive jurisdiction to affirm, modify and enforce or set aside (the order reviewed) in whole or in part." Section 6 (d) provides:

"(d) The jurisdiction of the Circuit Court of Appeals of the United States or the United States Circuit Court of Appeals for the District of Columbia, as the case may be, to enforce, set aside, or modify orders of the Commission shall be exclusive."

And in Section 6 (b), Congress provided that where a petition to review is filed in a Circuit Court of Appeals, the Commission shall file therein a transcript of the record, and thereupon "such court shall have exclusive jurisdiction to affirm, modify, and enforce or set aside such order, in whole or in part." The contentions of plaintiff that the fact question has not been settled against it either because its present action is an independent one or because there was a different object in the prior proceedings or because those proceedings were for limited purposes, cannot be sustained.

As to the parties. Another contention of the plaintiff in support of the present motion is that the parties to the present suit are not the same as in the former proceedings in that here the Collector of Internal Revenue is defendant and there the Coal Commission was respondent to the petition for review in the Circuit Court of Appeals.

In considering this contention it is observed that the powers conferred upon the Secretary of the Treasury and the Commissioner of Internal Revenue (and subordinately upon the Collector) in respect to the "tax" of Section 3 of the Bituminous Coal Act threatened to be enforced against plaintiff are dependent upon the determination of the plaintiff's status by the Commission and the Court of Appeals. The Commission and the Court are given the exclusive power to make that determination and have exercised the jurisdiction. The "tax", if any is due or

enforceable, is due to the United States. To the extent that the Commission has been entrusted with powers affecting the "tax" therefore, it is an agency of the United States, and to the extent that powers have been conferred upon the Collector and his superior officers, they are also agencies of the United States. It results from the paramount and sole interest of the United States that when a valid determination has been made between a party and an officer or agency of the United States in official capacity, it is conclusive between the party and any other of the government authorized as an agency of the government in respect to the same matter. *New Orleans v. Citizens Bank*, 167 U. S. 371, 388-389; *Bank of Kentucky v. Stone*, 88 Fed. 384, 395 (C. C. D. Ky.), affirmed 174 U. S. 799; *Gunter v. Atlantic Coast Line*, 200 U. S. 273, 284 ff; *Fait v. Western Maryland Ry. Co.*, 289 U. S. 620, 626-627.

In the case of *Shields v. Utah Idaho R. Co.*, *supra*, from which we have quoted the situation in regard to the parties was the same as is here presented. There the United States District Attorney was the party defendant who threatened to take action against the plaintiff, as does the Collector in this suit. The injunction that was issued in the lower courts ran against the District Attorney. The fact that the Interstate Commerce Commission intervened in the case did not affect the situation. Although no question as to the identity of the parties to the estoppel of the Commission's determination was discussed by the Supreme Court, this Court would not be at liberty to render decision at variance with that announced by the Supreme Court in the completely analogous situation.

We have given careful consideration to the earlier Supreme Court decisions cited and relied upon by plaintiff in support of its motion, including *State Corporation Commission of Kansas v. Wichita Gas Co.* 290 U. S. 561, 78 L. Ed. 500-504; *B. & O. Ry. Co. v. United States*, 298 U. S. 349, 80 L. Ed. 1209-1224; *United Gas Public Service Co. v. Texas*, 303 U. S. 123, 82 L. Ed. 702-711; *Crowell v. Benson*, 285 U. S. 22, 76 L. Ed. 598; *South Chicago Coal & Dock Co. v. Bassett*, 104 F. (2d) 522-525 (C. C. A. 7); *Ohio Valley Water Co. v. Ben Aron*, 253 U. S. 287, 64 L. Ed. 908-914. It may be conceded that different views have been expressed

as to the effect to be given in the courts to the determinations of administrative bodies under the varying circumstances presented in the adjudicated cases. No good purpose would be served by attempting a review of them in this opinion. None of those referred to would justify a refusal to follow those late decisions upon which we have relied.

We conclude that the plaintiff's motion to strike out the parts of defendant's and supplemental answer referred to in the motion should be denied and we so order.

Upon the pleadings now presented the finding of the court would be that the plaintiff was a producer of bituminous coal within the meaning of the Act at the times in the petition referred to, and the court would receive no testimony offered to the contrary.

But our ruling on the motion is made with full recognition of the right of the plaintiff to litigate the issues as to the validity or application of the statutory provisions concerning the "tax" or the rights which the plaintiff as a non-code member producer of bituminous may have in regard to the same.

Filed March 4, 1940.

EXHIBIT "B".**UNITED STATES CIRCUIT COURT OF APPEALS,
EIGHTH CIRCUIT****No. 421, Original.****MAY TERM, A. D. 1939.****SUNSHINE ANTHRACITE COAL COMPANY,***Petitioner.**vs.***NATIONAL BITUMINOUS COAL COMMISSION,***Respondent.*

[June 19, 1939.]

**Petition to Review Order of National Bituminous Coal
Commission.**

• Mr. Henry Adamson (Mr. George O. Patterson, Jr., Messrs. Patterson & Patterson, and Messrs. Adamson, Blair & Adamson were with him on the brief) for petitioner.

Mr. Robert E. Sher, Special Assistant to the Attorney General (Mr. Thurman Arnold, Assistant Attorney General; Mr. Hugh B. Cox, and Mr. Robert L. Stern, Special Assistants to the Attorney General; Mr. Robert W. Knox and Mr. John W. Nance, were with him on the brief) for respondent.

Before GARDNER and WOODROUGH, Circuit Judges, and OTIS,
District Judge

WOODROUGH, Circuit Judge, delivered the opinion of the court.

The Sunshine Anthracite Coal Company has petitioned for a review of an order of the National Bituminous Coal Commission by which it was determined that the underlying coal in certain counties of Kansas is bituminous coal within

the meaning of the Bituminous Coal Act of April 26, 1937 (15 U. S. C. A. 829 *et seq.*), and by which the petitioner's coal was denied exemption from the operation and effect of the Act.

The record discloses that the Sunshine Anthracite Coal Company, petitioner herein, is a corporation engaged in the production of coal in what is known as the Spadra field, located in Johnson County, Arkansas. Practically all of its coal is sold in states other than Arkansas. On July 27, 1937, the National Bituminous Coal Commission issued its Order No. 28, providing a method whereby producers of coal might secure a determination by the Commission as to whether or not their coal is subject to the Bituminous Coal Act of 1937. On August 31, 1937, petitioner filed with the Commission an application for a certificate exempting it from the operation and effect of the Bituminous Coal Act of 1937 on the ground that the coal produced by it is not bituminous coal as defined in Section 17 of the Act, which reads in part:

“As used in this Act—

(a) The term ‘coal’ means bituminous coal.

(b) The term ‘bituminous coal’ includes all bituminous, semibituminous, and subbituminous coal and shall exclude lignite, which is defined as a lignitic coal having calorific value in British thermal units of less than seven thousand six hundred per pound and having a natural moisture content in place in the mine of 30 per centum or more.”

On September 24, 1937, the Commission issued Order No. 53, directing that a public hearing be held on October 4, 1937, at Fort Smith, Arkansas, for the purpose of receiving evidence to enable the Commission to determine whether or not any part of the coal produced in Arkansas is or is not bituminous coal as defined in Section 17 (b) of the Act. The Order further provided that the hearing should include a hearing on the application for exemption filed by the Sunshine Anthracite Coal Company and on any other applications for exemption filed from the State of Arkansas pursuant to Order No. 28. An examiner was assigned to conduct the hearing.

After notice, the hearing was held as directed on October 4, 5, and 6, 1937. At the hearing the Sunshine Anthracite Coal Company introduced evidence in support of its claim that the coal produced by it was not bituminous coal within the meaning of the Act. This evidence was to the effect that petitioner's coal is mined from what is known as the Spadra field in Johnson County, Arkansas; that coal from this field has been advertised and sold as Arkansas anthracite in various markets for a number of years; that by certain methods of classifying coals by rank on the basis of chemical analysis, including the method adopted by the American Society for Testing Materials, petitioner's coal is classified as semianthracite.

When petitioner concluded the presentation of its evidence, the examiner heard further evidence upon the question indicated by the order of hearing. This evidence tended to show the term "anthracite coal" had come to be identified in the trade as Pennsylvania anthracite; that there is a substantial difference in price between Spadra coal and Pennsylvania anthracite; that coal produced by petitioner and others from the Spadra field is sold in the various markets of the middle west in direct price competition with West Virginia Pocahontas, which is a low volatile bituminous coal; that in its physical characteristics Spadra coal more nearly resembles other bituminous coals than Pennsylvania anthracite; that Spadra coal burns with a yellowish flame, which is characteristic of bituminous, rather than with a blue flame, which is characteristic of anthracite; that the methods and appliances used in mining the coal are similar to those used in mining bituminous coal in other parts of the country and differ materially from the methods used in mining anthracite; that the miners in the Spadra field are paid on the basis of the bituminous contract of the United Mine Workers and not on the basis of the higher wage scale in effect in the anthracite field.

The evidence further showed that there were at least sixteen different methods of classification of coals by rank, on the basis of chemical analysis, under some of which petitioner's coal would be classified as bituminous and under others as semianthracite; that while, under the method

of classification adopted by the American Society for Testing Materials, petitioner's coal would fall in the semi-anthracite class, it is very close to the dividing line between semianthracite and the highest ranking bituminous coal; that the American Society for Testing Materials, which is a private organization without official status, issued certain standards as tentative in the year 1934; that such standards have been changed in certain respects from year to year until its present standards were adopted in 1937, after passage of the Bituminous Coal Act of 1937.

At the conclusion of the evidence the examiner took the matter under advisement. On January 21, 1938, he filed a report, which is dated December 3, 1937, containing proposed findings of fact and a recommendation that an order be entered declaring all coals produced in the State of Arkansas to be subject to the Bituminous Coal Act of 1937 and that petitioner's application for exemption be denied. On the same day petitioner filed with the Commission a motion for voluntary dismissal of its application for exemption. This motion was denied by the Commissioner on February 3, 1938.

Petitioner was served with a copy of the examiner's report and filed exceptions thereto. On April 28, 1938, the Commission issued a proposed report containing tentative findings of fact and a conclusion that all coal in the State of Arkansas, including that of petitioner, is subject to the Bituminous Coal Act of 1937. Petitioner was served with a copy of the proposed report and findings and given thirty days in which to file exceptions. Exceptions were filed and on July 7, 1938, counsel for petitioner appeared before the Commission and made oral argument in support of its position.

On August 31, 1938, the Commission rendered an opinion in which it reaffirmed the position taken in its earlier report that all coals produced in Arkansas, including that of petitioner, are subject to the Act. An order was entered the same day denying petitioner's application for exemption and declaring that all coals produced in certain named counties in Arkansas are bituminous coal. Petitioner did not file any objections or exceptions to the final order of the

Commission but petitioned this court for review under Section 6-b (15 U. S. C. A. 836b):

The petitioner's assignments of error to this Court present (1) that the Commission was without jurisdiction; (2) that it erred in denying the petitioner's motion for voluntary dismissal; (3) that the findings and order are without substantial evidence to support them.

(1) Jurisdiction. The petitioner contends that the jurisdiction of the National Bituminous Coal Commission in fixing maximum and minimum prices, rules and regulations, is limited by the Act to coal producers who have accepted the code, and that as petitioner has not become a code member the Commission is given no power to hold a hearing and determine the class or kind of coal produced from petitioner's mines. It argues that "whether or not the coal it produces is bituminous, anthracite, semianthracite, lignitic or what not, is of no interest to the Commission until such time as the producer applies for membership in the Code."

The Commission has rested its jurisdiction to determine whether petitioner's coal is bituminous within the meaning of the Act upon two separate and distinct bases: (1) Upon the general power of the Commission to make all reasonable rules and regulations for carrying out the provisions of the Act¹ and (2) upon the power to grant exemptions under Section 4 A.²

¹ "Such Commission shall have the power to make and promulgate all reasonable rules and regulations for carrying out the provisions of this subchapter * * *." 15 U. S. C. A. 829 (a).

² "Any producer, believing that any commerce in coal is not subject to the provisions of sections 831, 832 and 833 or to the provisions of the first paragraph of this section may file with the Commission an application, verified by oath or affirmation for exemption, setting forth the facts upon which such claim is based. The filing of such application in good faith shall exempt the applicant, beginning with the third day following the filing of the application, from any obligation, duty, or liability imposed by sections 831, 832 and 833 with respect to the commerce covered by the application until such time as the Commission shall act upon the application. If the Commission has reason to believe that such exemption during the period prior to action upon the application is likely to permit evasion of the sub chapter with respect to commerce

We think the grounds of jurisdiction relied upon by the Commission are fully sustained. They are presented as follows:

The Bituminous Coal Act provides that the National Bituminous Coal Commission established thereunder shall proceed to fix minimum prices for coal. District boards of producers are to be organized. Section 4-I (a). These Boards, as soon as possible after their creation, are to determine from cost data submitted to them by the statistical bureaus of the Commission 'the weighted average of the total costs of the ascertainable tonnage produced in the district in the calendar year 1936.' Section 4-II (a), 7th paragraph. The Commission is then to determine from the weighted average costs submitted by the district boards the average costs of larger geographic units known as minimum price areas. Section 4-II (a), 7th paragraph. The Commission transmits the average so determined back to the district boards, and each board is required to propose minimum prices for each district so as to yield a return equal to the weighted average cost of its minimum price area. Section 4-II (a), 3rd paragraph. The prices so proposed are to be submitted to the Commission for approval, disapproval, or modification. Section 4-II (a), 5th paragraph. Prices then are to be coordinated among the various districts and the coordinated prices submitted to the Commission for approval. Section 4-II (b).

in coal property subject to the provisions of sections 831, 832 and 833 or of the first paragraph of this section, it may suspend the exemption for a period not to exceed ten days. Within a reasonable time after the receipt of any application for exemption the Commission shall enter an order granting, or, after notice and opportunity for hearing, denying or otherwise disposing of such application. As a condition to the entry of and as a part of any order granting such application, the Commission may require the applicant to apply periodically for renewals of such order and to file such periodic reports as the Commission may find necessary or appropriate to enable it to determine whether the conditions supporting the exemption continue to exist. Any applicant aggrieved by an order denying or otherwise disposing of an application for exemption by the Commission may obtain a review of such order in the manner provided in subsection (b) of section 836." 15 U. S. C. A. 834.

"The activities of the Commission and the district boards can not, of course, be carried on unless they know what coal is subject to the Act. The very first step in the price fixing process is the determination of the weighted average cost 'of the ascertainable tonnage' of the coal produced in each district. Thus, at the very beginning some means of defining 'ascertainable tonnage' is necessary."

"Section 17 of the Act contains the basic definitions. But its definitions do not in themselves establish any mechanism for determining what coal comes within them."

"At the very beginning of its proceedings the Commission found itself faced with the necessity of deciding what coal was to be included within the 'ascertainable tonnage' in computing average costs. The determination had to be made in advance of other action if the Commission was to proceed. The Act did not create any other agency than the Commission capable of making it. The Commission obviously was not in a position to call upon the courts to construe the Act for it in that stage of the proceedings in order to aid it in its administrative process."

"Section 2 (a) of the Act authorizes the Commission to make all reasonable rules and regulations for carrying out the provisions of the Act. Since the Commission could not function unless the nature of the coal subject to the Act was determined, it issued its Order No. 28, which provided a procedure for determining what coal was subject to and what exempt from the statute. Subsequently it ordered a general investigation to be held as to the character of coals in Arkansas, and combined the hearing under the latter order with that on petitioner's application for exemption."

"We believe that the power of the Commission to make such orders would be implied from the inherent necessities of the situation, even if there had been no authority in the Act to make all reasonable rules and regulations. Congress obviously did not intend that the scope of operation of the Act in certain areas containing coal on the border line of the statutory defini-

tion should remain indefinitely indeterminate. The statute plainly could not be carried out unless and until it was decided which coal came within the statutory definition.

"There is ample precedent for administrative bodies determining their own jurisdiction at the commencement of the investigation of a question, subject, of course, to appropriate judicial review. In *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41, an employer sued to restrain the National Labor Relations Board from holding a hearing on a complaint of alleged unfair trade practices on the ground that the employer was not engaged in interstate or foreign commerce and therefore not within the jurisdiction of the Board. In disposing of this contention, the court said, at p. 49:

" 'It is true that the Board has jurisdiction only if the complaint concerns interstate or foreign commerce. Unless the Board finds that it does, the complaint must be dismissed. And if it finds that interstate or foreign commerce is involved, but the Circuit Court of Appeals concludes that such finding was without adequate evidence to support it, or otherwise contrary to law, the Board's petition to enforce it will be dismissed, or the employer's petition to have it set aside will be granted.'

"The National Labor Relations Act does not expressly authorize the Labor Relations Board to determine whether or not an employer is engaged in interstate or foreign commerce. Section 8 of that act (29 U. S. C., Sec. 158) defines certain unfair labor practices. Section 10 (a) (29 U. S. C., Sec. 160 (a)) provides that the Board is empowered to prevent any person from engaging in any unfair labor practice (listed in Section 158) affecting commerce. The term 'affecting commerce' is defined as meaning in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce

or the free flow of commerce. On the basis of this language the Supreme Court held that it is for the Board to determine, after notice and hearing, whether or not a particular unfair labor practice affects commerce. So here, where a determination of the character of coals in different parts of the country was a necessary incident to the performance of its other functions, the Commission was authorized to make the necessary determination.¹

"Other cases in which the Supreme Court has indicated that it was proper for administrative agencies to determine their own jurisdiction are *Interstate Commerce Commission v. Humboldt Steamship Co.*, 224 U. S. 474; *United States ex rel. Chicago Great Western Railroad Co. v. Interstate Commerce Commission*, 294 U. S. 50.

"Petitioner argues that any power the Commission may have to determine what coal is subject to its jurisdiction is limited to 'code members,' and that since it is not a code member, the Commission's authority does not extend to it. The contention is that since the Commission is authorized to fix prices only for code members,² there is no reason for it to be interested in the nature of the coal produced by non-code members. It is true that the Commission may only fix minimum prices for code members, and then only for sales of coal in or directly affecting interstate commerce. But the general powers of the Commission are not limited to code members. The Commission is required to base its weighted average cost figures—on which all the minimum prices ultimately rest—on the 'ascertainable tonnage' in the district, not alone on that of code members. In order that it may obtain reports on costs

¹ "We are not here concerned with the scope of judicial review of such determinations or whether the courts may have wider latitude in reviewing when the jurisdictional question relates to the limits of Federal constitutional power than otherwise.

² "Producers who do not accept the code and thereby become code members are required to pay a 19½ per cent tax on their gross sales. Section 3.

from all producers, Section 10 (a) of the Act authorizes the Commission to require cost reports from 'producers,' not merely from code members. Producers are defined in the Act as meaning 'all individuals, firms, associations, corporations, trustees, and receivers engaged in the business of mining coal,' whereas code members mean only 'producers accepting membership in the code.' Section 4.

"In a case involving the status of these cost reports, the only case under the Coal Act which has reached the Supreme Court, that Court held that the 'language of Section 10 (a) applies to all producers.' *Utah Fuel Co. v. National Bituminous Coal Commission*, 59 S. Ct. 409, decided January 30, 1939.

"The Commission is thus plainly empowered to require the filing of cost reports by all producers of bituminous coal, whether code members or not. Since it must have such information as to costs from all producers, its power to determine what coal is bituminous must likewise extend to noncode members as well as to code members.

"Petitioner's suggestion that the jurisdiction of the Commission is limited to code members would lead to extremely impractical results. If the costs of only code members could be considered in computing the weighted average cost upon which prices were to be based, that average would change almost daily, whenever a new producer accepted the code. A national price structure built on such a shifting base would be an extremely unstable one. Moreover, it was obviously more desirable from the standpoint of both the public and the industry to give the minimum prices the broadest possible foundation of average cost.

"We think that the necessary power of the Commission to determine what coal comes within the Act must apply equally to code members and to noncode members. Thus, the Commission had jurisdiction both generally to investigate the status of all coal in Arkansas and specifically to determine whether petitioner's coal was subject to the Act.

"(2) What has been said demonstrates that in order to accomplish its statutory duties the Commission must have power on its own initiative to investigate the status of coal to determine whether it is subject to the Act, regardless of whether particular producers file applications for exemption. By Section 4-A of the Act Congress established a procedure specially designed to give protection to individual producers claiming to be exempt.

"The second paragraph of Section 4-A provides that any producer believing that any commerce in coal is not subject to the provisions of Section 4 or of the first paragraph of 4-A may file with the Commission an application for exemption. The filing of such an application exempts the applicant beginning with the third day thereafter from the obligations imposed by Section 4 of the Act. Within a reasonable time after receipt of an application for exemption the Commission is required to enter an order granting, or after notice and opportunity for hearing, denying or otherwise disposing of such application. An order of the Commission disposing of such application is reviewable in the manner provided in Section 6 (b).

"The section thus provides a complete and adequate remedy, including protection during the course of the administrative proceeding, for persons claiming to be exempt from the Act.

"The contention of petitioner that this section is not applicable to noncode members and consequently is not applicable to it, is inconsistent with the theory on which petitioner has invoked the jurisdiction of this Court, which seems to be bottomed largely on Section 4-A. But apart from this it is plain that Section 4-A is not limited in application to code members. It provides that 'any producer' may file an application for exemption. As we have pointed out 'producer' is defined in the Act as including all producers of coal, while 'code member' is defined as meaning only those producers who accept the code. The decision of the Supreme Court in the *Utah Fuel* case, *supra*, that the

word 'producer' as used in Section 10 (a) applies 'to all producers' is plainly controlling with respect to the same word as used in Section 4-A.

"The obvious purpose of Section 4-A also reflects that it was intended to apply to all producers rather than merely to code members. Congress sought to establish a procedure to enable producers to know whether they were subject to the Act. Producers who were not code members might for various reasons desire to know whether or not they were exempt before joining the code; the decision on their application for exemption might determine whether or not they would accept the code.

"In this case petitioner filed an application for exemption with the Commission. The Commission, following the procedure prescribed in the statute, held a hearing and entered an order. Petitioner now, still following the plan outlined in Section 4-A, seeks to have that order reviewed in this Court. Under these circumstances there can be no doubt as to the Commissioner's jurisdiction to hold the hearing and make the order involved in the review.

"As the Commission had jurisdiction to make the determination as to whether petitioner's coal was subject to the Act, the scope of judicial review of its ruling is that set forth in the recent opinion of the Supreme Court in *Shields v. Utah Idaho Central R. R. Co.*, 59 Sup. Ct. 160, (305 U. S. 177, 185) decided December 5, 1938, The Court there said, at p. 165:

"As this authority [to make the determination in question] was validly conferred upon the Commission, the question on judicial review would be simply whether it had acted within its authority." [Citing cases.]

"The condition which Congress imposed was that the Commission should make its determination after hearing. There is no question that the Commission did give a hearing. Respondent appeared and the evidence which it offered was received and considered. The sole remaining question would be

whether the Commission in arriving at its determination departed from the applicable rules of law and whether its finding had a basis in substantial evidence or was arbitrary and capricious. That question must be determined upon the evidence produced before the Commission.

"The principles there set forth are plainly applicable here whether the Commission's authority is derived from the express language of section 4-A or the general provisions of section 2(a).

"Section 6 (b) of the Bituminous Coal Act provides that the findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. It should be noted that in the *Shields* case the statute involved did not contain any such provision, so that the limitation upon the scope of judicial review there recognized a *fortiori* applies here."

(2)

Petitioner's motion for voluntary dismissal of its petition for exemption was made on the same day that the report of the examiner was filed, though the examiner's report bears date some six weeks earlier. The petitioner's position is that it had unqualified right to dismiss. *Jones v. Securities Exchange Commission*, 298 U. S. 1, is cited and relied on.

In order for the Commission to perform the functions required of it by the terms of the Bituminous Coal Act it was necessary that it should proceed as one of the first steps to make determination whether the coals in the counties of Arkansas were subject to the Act. The public interest in the effective administration of the Act required that to be done, irrespective of the petitions for exemption presented by the petitioner and the two other Arkansas coal producing companies which associated themselves with the petitioner in the claims for exemption. Some of the Spadra coal producers thought their coal was bituminous within the Act, but it was recognized by all of them that a decision had to be made covering the whole field. The Com-

mission accordingly gave the notice and caused the hearing to be had "for the purpose of receiving evidence to enable the Commission to determine whether or not any part of the coal produced in the State of Arkansas does not come within the purview of Section (b) of the Act." Although the petition for exemption presented by the Sunshine Anthracite was in the form of affirmative action taken by it and in the order of taking the proof at the hearing the Sunshine company presented evidence first, the real moving party seeking determination of the broad question as to the applicability of the Act to Arkansas coals was the Commission. The petitioner opposed the conclusion that all the coals in the area were within the Act. It could not by dismissing its petition prevent the Commission from making determination upon that question which was the subject matter of the hearing.

The Commission's determination set forth in the first paragraph of the order under review that all Arkansas coals, including those of petitioner, are subject to the Act, would be equally binding upon petitioner whether it withdrew from the hearing before the final decision thereon or not.

The case of *Jones v. Securities Exchange Commission*, *supra*, does not support the petitioner's assignment of error. There Jones had withdrawn his application for registration of his securities before hearing, and the court found nothing in the record to indicate that the public or investors would be prejudiced by stopping the proceedings or dismissing the same. The court said:

"In this proceeding, there being no adversary parties, the filing of the registration statement is in effect an *ex parte* application for a license to use the mails and the facilities of interstate commerce for the purposes recognized by the act. We are unable to see how any right of the general public can be affected by the withdrawal of such an application before it has gone into effect. Petitioner emphatically says that no steps had been taken looking to the issue of the securities; and this is not denied. So far as the record shows, there were no investors, existing or potential,

to be affected. The conclusion seems inevitable that an abandonment of the application was of no concern to anyone except the registrant. The possibility of any other interest in the matter is so shadowy, indefinite, and equivocal that it must be put out of consideration as altogether unreal. Under these circumstances, the right of the registrant to withdraw his application would seem to be as absolute as the right of any person to withdraw an ungranted application for any other form of privilege in respect of which he is at the time alone concerned."

In this case there were other interests than those of the petitioner concerned in the hearing—the interest of the public in the effective administration of the Act, and the interests of petitioner's competitors. Some competitors who had accepted the Act were convinced that if petitioner could obtain exemption from the Act it could drive all its Arkansas competitors from the field. Although the Arkansas coal has great merit, it is hard to sell in sufficient quantity to maintain the mine organization or to provide continuous employment for the miners. The competition among the mines presents the most difficult problem of the operators, and those competitors who did not associate themselves with petitioner to deny that the Arkansas coal was within the Act were vitally concerned to have it determined that the Act applied to all alike. We find no prejudicial error in the denial of petitioner's motion to dismiss made after the conclusion of the hearing. The Evidence: The testimony before the Commission, which has been epitomized for this Court by counsel of the Commission and carefully compared and considered, included that of H. W. Collier. He has been in the coal-mining business since 1901 and at the time of the hearing was operating a mine in the Spadra field, three or four miles from petitioner's mine, taking coal of the same type from the same seam. He identified certain samples of coal taken from petitioner's mine and other mines in the same vicinity and testified that in his opinion they were all semibituminous. He testified that semibituminous is a smokeless coal and cokes very little. Anthracite coal burns with a

blue flame, all other coals with a more or less yellow flame. All Arkansas coals have a more or less yellow flame. Spadra coal does not resemble Pennsylvania anthracite in looks, hardness, or friability. Pennsylvania anthracite is much harder and less friable than Spadra or other coals in that section. Spadra coal is very similar in appearance to West Virginia Pocahontas and Paris, both of which are semibituminous. He further testified that south of Omaha, Nebraska, Spadra coal competes primarily with other coals from Arkansas and Oklahoma; north of Omaha almost entirely with Pocahontas. In the Twin Cities the retail prices of Spadra and Pocahontas are usually about the same. Spadra prices are based on the prices of other coals in the immediate vicinity and of Pocahontas; not on Pennsylvania anthracite.

Heber Denman testified that he was graduated from Lehigh University as a mining engineer in 1882 and has been operating mines in Oklahoma and Arkansas since 1898; that Spadra coal is taken from what is known as the Hartshorne seam and that coals from that seam are generally known and recognized as semibituminous. He further testified that all of the coal introduced in evidence (which included a sample from petitioner's mine) was semibituminous with the exception of Exhibit 1, which he identified as Pennsylvania anthracite. He further testified that Spadra coals compete primarily with other coals from the vicinity and with Pocahontas from West Virginia. On cross-examination, he testified that there is a difference between Spadra coal and some of the other coals in Arkansas, that they differ with respect to the hardness of the coal and in the amount of fixed carbon and volatile matter, but that the difference is not sufficient to place Spadra coal in a different classification. He reiterated the opinion expressed on direct examination that Spadra coal is semibituminous.

S. A. Bramlette testified that he has been connected with the coal industry for 40 years, and that there was no anthracite or semianthracite coal in Arkansas; that Arkansas coals compete primarily with other coals from the same general area, but more particularly with West Virginia Pocahontas,

which is a low volatile, high grade bituminous coal. He further testified that at one time he put on an exhibit of Spadra coal at the State Fair at Little Rock at the request of the producers of that field to demonstrate the burning quality of the coal. On the basis of his experience and observation in connection with that experiment, he testified that Spadra coal is slow in igniting, but lights with a yellowish flame, and that the yellowish flame continues until the entire mass of coal becomes a red body. He also testified that the term semianthracite denotes a lower rank of coal than anthracite, whereas the term semibituminous is the same as superbituminous and denotes a higher rank of coal than bituminous. Subbituminous is a lower rank than bituminous. He also testified that Spadra coal competes principally with West Virginia Pocahontas and not with Pennsylvania anthracite.

J. G. Puterbaugh testified he has been in the coal business for 42 years and at the time of the hearing was operating a mine at Spadra, about three-quarters of a mile from that of petitioner, taking coal from the same seam. He testified that Spadra coal has the appearance of West Virginia Pocahontas as well as of other coals produced in Western Arkansas; that it is not as bright, shiny, or brittle as Pennsylvania anthracite; that wages in the Spadra mine are fixed on the basis of the bituminous wage contract of the United Mine Workers; that the price of Spadra coal is fixed on the basis of the prices of other coals produced in Arkansas. He further testified that the market for Spadra coal is in western Missouri, eastern Kansas, and eastern Nebraska, and to a larger extent in Minneapolis and St. Paul, where it competes primarily with Pocahontas. In the winter of 1936-7, the retail price of Pocahontas in Minneapolis was 90¢ a ton higher than the retail price of Spadra. On the first of September 1937, the retail price of Pocahontas was 50¢ lower than Spadra. The prices of the two coals are very close together and fluctuate about as those figures indicate.

R. A. Young testified he has been a coal operator for 40 years and at one time was Arkansas state mine inspector; that in his opinion there was no semianthracite

coal in Arkansas, and that all Arkansas coal was bituminous.

David Fowler, president of District 21 of the United Mine Workers, testified that he had been in the coal industry since he was nine years old; that he had worked in the mines for 35 years, most of the time in the anthracite fields of Pennsylvania but some of the time in various bituminous fields. He stated that he was able to distinguish anthracite and bituminous by their appearance; that all of the coals introduced in evidence (including that from petitioner's mine) were either bituminous or semibituminous, except for Exhibit 1, which he identified as Pennsylvania anthracite. He further testified that the United Mine Workers have two basic contracts, one for bituminous and one for anthracite; that the wage scale in the Spadra field is based on the bituminous contract; that had the anthracite contract been in effect, the miners would have received three dollars a day more. He further testified that there is a great difference in the methods of mining in the anthracite fields of Pennsylvania and the methods used in the Spadra field in Arkansas.

Petitioner's president stated that they were perfectly willing to admit that they mine coal differently in the anthracite fields of Pennsylvania than they do in Arkansas, no matter what the seam.

Petitioner's Exhibit 10 shows that the prices of "Arkansas Anthracite" and of West Virginia Pocahontas in effect in Minneapolis in November 1935 were substantially the same. Arkansas egg was \$13.45 a ton; Pocahontas egg was \$13.70; Arkansas stove was \$13.70 a ton; Pocahontas stove was \$13.40. Pennsylvania anthracite was approximately \$2.50 a ton higher in price.

The Commission found, i. a.

"2. The coal produced by petitioner and intervenors is generally similar to the high-grade bituminous coals of other fields, such as the Pocahontas Smokeless coals of West Virginia. The structure is hard but not as hard as Pennsylvania anthracite coal, nor does it have the structure and appearance of anthracite. It is a low volatile coal with a high percentage of fixed carbon, but not as high as that of anthracite, and the sulphur

content is high. It is mined in the same manner as bituminous coal is mined which differs materially from the methods of mining anthracite. Spadra coal, including that of petitioner and intervenors is mined under the Bituminous Wage Scale which is substantially lower than the Anthracite Wage Scale. Spadra coal has the appearance of bituminous coal and its burning characteristics are similar thereto and unlike those of anthracite. Coals mined in adjoining fields have qualities comparable with the coals of the Spadra field, although they differ slightly in volatile matter and fixed carbon, but, the difference is so slight as to be unnoticeable in the merchandising thereof. The coals of adjoining producers in the Spadra field enter the same consuming markets as the coals of the petitioner and intervenors in competition with one another without regard to differences in their qualities. All Spadra coals are competitive in northern markets with the Smokeless coals of West Virginia and other high-grade bituminous coals, but in no markets are they competitive with Pennsylvania anthracite.

"5. There was much expert testimony offered to the effect that all coal in the Spadra field is bituminous coal. There is noticeable agreement among all the witnesses and it is admitted by petitioner and intervenors that their coal is the same as that produced by their neighbors in the same field. The great weight of the expert testimony is to the effect that all Spadra coal is bituminous, is well established as such, and has been so established over a long period of years in the various markets into which it moves."

It is the position of the Commission that it was not bound to make its determination as to the status of the coal solely on the basis of the chemical analysis of the coal calculated according to the formula adopted by the American Society for Testing Materials. Its counsel presents:

"In the first place, chemical analysis alone is not controlling. It is a factor that is entitled to consideration. In its opinion the Commission recognizes that

chemical analysis, including the proper fuel ratio, is an important element to be considered. But it is not the sole factor. If Congress had intended that chemical analysis was to be the sole guide for Commission action, it is reasonable to suppose that it would have said so in plain and explicit language.

"That no one factor is controlling in determining the classification of coal is clearly indicated by the *Supreme Court in Heisler v. Thomas Colliery Co.*, 260 U. S. 245. In that case it was argued that because anthracite and bituminous were directly competitive, it was arbitrary to classify them differently for purposes of taxation. The Court held that the mere fact of competition was not controlling, but that all other factors, such as the amount of fixed carbon, the amount of volatile matter, color, lustre, structural character, and other physical characteristics were entitled to consideration. On the basis of all of these factors, not of any one alone, it was held that the differences in the two coals afforded a sufficient basis for classifying them differently.

"It does not appear that Congress intended that the particular formula for classifying coals by rank adopted by the American Society for Testing Materials shall be binding on the Commission."

"L. N. Plein, formerly with the Bureau of Mines and presently employed as a technician by the Bituminous Coal Commission, testified as to the history of classification of coal. He testified that since 1800 there have been many attempts to classify coal in some way or other. He named at least sixteen methods that had been put forward by different authors. He stated that all of these various methods of classifying coals are very confusing when we come to the practical side of determining what coal is and *how to sell it*. In 1927 the American Society for Testing Materials appointed a committee to make a study of the classification of coals. In 1934 this Committee published certain 'Tentative Specifications for Classification of Coals by Rank'. Changes were made in the tentative standards

in 1935 and in 1936. During the week of September 20, 1937, the tentative standards were given final approval by the Committee.

"The A. S. T. M. formula classifies coal by rank according to fixed carbon and calorific value calculated on a mineral-matter-free basis. Under this formula the highest ranking anthracite is meta-anthracite, then anthracite, then semianthracite. Immediately below semianthracite is low volatile bituminous, which is the highest ranking bituminous. Semianthracite is defined as non-agglomerating coal with a fixed carbon content of between 86 and 92 per cent calculated on a dry mineral-matter-free basis. Low volatile bituminous is coal having a fixed carbon content of between 78 and 86 per cent calculated on a dry-mineral-matter-free basis. There is no such classification as semibituminous.

"It is true that under this formula, petitioner's coal would fall in the semianthracite class. Analyses of coal taken from petitioner's mine show that its fixed carbon content ranges from 86.39 to 88.04 per cent. It is just over the line between low volatile bituminous and semianthracite, almost in what might be called the twilight zone between the two.

"If the A. S. T. M. standard is controlling in the situation here presented, it can only be because Congress so intended. The Bituminous Coal Act of 1937 makes no mention of the A. S. T. M. standards. The tentative standards were first announced in 1934 and were widely accepted. Congress was either aware or unaware of the existence of such standards when it passed the Act. If it was unaware of them, it obviously could not have intended them to be controlling. If Congress was aware of the existence of the A. S. T. M. standards, the fact that it adopted an entirely different classification indicates that it did not enact that particular formula into law. The statute refers to only three kinds of bituminous coals, bituminous, semibituminous, and sub-bituminous; the word 'semibituminous' was used to describe the highest grade of bituminous coal. The A. S. T. M. classifies bitumin-

ous as low volatile bituminous, medium volatile bituminous, high volatile A bituminous, high volatile B bituminous, high volatile C bituminous, subbituminous, A, subbituminous B and subbituminous C. It makes no mention of any such coal as 'semibituminous.' If Congress had intended the A. S. T. M. standards to govern it would either have expressly so provided, or indicated.

"That Congress did not have the A. S. T. M. classification in mind is further indicated when we consider the definition of lignite. Section 17 (b) provides that lignite shall be excluded from the Act and defines it as a lignitic coal having calorific value in British thermal units of less than seven thousand six hundred per pound and having a natural moisture content in place in the mine of 30 per cent or more. The A. S. T. M. classification defines lignite as a coal having less than eighty-three hundred moist British thermal units. Thus, even where Congress adopted a scientific test, it used one that differed from that adopted by A. S. T. M.

"But the American Society for Testing Materials is not an official body. It is not subject to governmental control. It has a constantly shifting membership. It may change its standards from day to day, from year to year. It has in fact made some changes in its standards in each of the years since the tentative standards were first put forth in 1934. Two such changes directly affecting petitioner's coal were (1) the change from the agglutinating test to the agglomerating test for anthracite, and (2) the change in the specification for low volatile bituminous from a range of 14 to 23 per cent of volatile matter to a range of 14 to 22 per cent. Changes of even greater significance might have been made had the Society seen fit to do so. Thus, coal which is subject to the provisions of the Act on one day may be entirely free from either regulation or tax the next because of the decision of a private organization in no way interested in or concerned with the effect of their determination on the administration of the Act. Irrespective of any question of the pro-

priety of the delegation of legislative power were the Act so construed, there is every reason for avoiding a construction so plainly out of harmony with orderly administration of law.

"We should like to point out that we have no quarrel with the method of classification adopted by A. S. T. M. It is a good method. It is entitled to weight in arriving at a definition of terms. But it is only one of many factors that must be considered. And where on every other basis except chemical analysis a coal more nearly resembles bituminous than anthracite, and where the exclusion of such coal from the provisions of the Act would give its producers an unfair competitive advantage over neighboring producers and tend to break down the orderly administration of the statute, the determination of the Commission that such coal comes under the Act was clearly justified.

"What was said by the Supreme Court with reference to the Transportation Act of 1920 in *Piedmont & Northern Railway Co. v. Interstate Commerce Commission*, 286 U. S. 299, is peculiarly appropriate here. The Court said, at p. 311:

"The Transportation Act was remedial legislation and should therefore be given a liberal interpretation; but for the same reason exemptions from its sweep should be narrowed and limited to effect the remedy intended."

"If the Commission was authorized to consider other factors than chemical analysis in arriving at its determination, there was ample evidence, as we have already pointed out, to sustain its findings. The classification of coals is a subject requiring a specialized knowledge of the coal industry. In such a field the findings of a Commission specially created for that purpose should not be lightly disturbed on appeal.

"Petitioner makes the suggestion in its brief that Congress intended the word semibituminous to describe a grade of coal of a rank lower than bituminous. Such a definition is at variance with the dictionary definition of the word. Webster's New International

Dictionary 1933. It is also at variance with the uncontradicted evidence in the record. All of the witnesses who testified with respect to it agreed that semibituminous was a higher grade than bituminous and semi-anthracite a lower grade than anthracite.

"Petitioner also argues that the findings of the Commission should be set aside because hearsay and other irrelevant testimony was introduced at the hearing. To this contention there are two answers.

"First, Petitioner offered no objection to the introduction of this evidence. Section 6 (b) of the Act provides that no objection to an order of the Commission shall be considered by the court on appeal unless the objection shall have been urged below. The failure to object at the hearing before the examiner precludes petitioner from raising such objection here.

"Second. The fact that incompetent or irrelevant evidence got into the record is immaterial if there was competent evidence in the record to sustain the findings. This follows from the language of Section 6 (b), which provides that the findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. In disposing of a similar contention in *Consolidated Edison Co. v. National Labor Relations Board*, 59 Sup. Ct. 206, 217, (305 U. S. 197), the Supreme Court said:

" 'The companies urge that the Board received 'remote hearsay' and 'mere rumor'. The statute provides that 'the rules of evidence prevailing in courts of law and equity shall not be controlling'. The obvious purpose of this and similar provisions is to free administrative boards from the compulsion of technical rules so that the mere admission of matter which would be deemed incompetent in judicial proceedings would not invalidate the administrative order. *Interstate Commerce Commission v. Baird*, 194 U. S. 25, 44; *Interstate Commerce Commission v. Louisville & Nashville R. R. Co.*, 227 U. S. 88, 93; *United States v. Abilene & Southern Ry. Co.*, 265 U. S. 274, 288; *Tagg Bros. & Moorhead v. United States*, 280 U. S. 420, 442. '

"In that case the Court found from an examination of the record that it contained substantial evidence to support the Board's findings. The rest was disregarded. We have already demonstrated that there is ample competent evidence in the record in this case to sustain the Commission. If there be some evidence in the record that would not be strictly admissible in a judicial proceeding, it is immaterial.

"We do not mean to indicate by the above statement that the Commission might not properly consider evidence that would not be admissible in a court of law under a strict application of the rules of evidence. The same rules of evidence plainly do not apply under the more flexible administrative procedure. But in view of the amount of judicially competent evidence supporting the Commission's determination, we do not feel it necessary to rely on any other testimony or to argue as to its admissibility."

We think the position of the Commission is sustained by the foregoing considerations and that its findings were based on substantial evidence appearing in the record.

We also sustain the claim of the Commission that its findings were appropriate to the testimony and the questions presented. In its opinion, the Commission found:

"(1) That petitioner's mine is in the Spadra field in the Hartshorne seam in Arkansas and that its coal competes with bituminous coals from other fields in the district.

"(2) That petitioner's coal is similar in structure and appearance to high grade bituminous coals from other fields such as Pocahontas from West Virginia; that in the manner of mining and in its burning characteristics it is similar to bituminous and unlike anthracite; that the miners are paid on the basis of the bituminous wage scale which is lower than the anthracite wage scale; that Spadra coals compete in the same consuming markets with the coals of adjoining producers and with high grade bituminous coals from

West Virginia, but are not competitive with Pennsylvania anthracite .

“(3) That the great weight of the expert testimony is to the effect that all Spadra coal is bituminous.

“(4) That approximately 98 per cent of petitioner's production is exported from Arkansas.”

After considering and disposing of petitioner's contention that the method of classification of coals by rank promulgated by the American Society for Testing Materials is controlling, the Commission goes on to state:

“The evidence in the record herein shows that the coals of petitioner and intervenors fall short of the description of anthracite and clearly come within the definition of bituminous as the two coals are distinguished and defined in the *Heisler* case, *supra*.

“While the chemical analysis, including the proper fuel ratio, is an important element to be considered, other necessary factors for a proper ranking of coals are physical features or structure and burning characteristics. This Commission, and the former Commission, found it impossible to classify coals upon chemical analysis alone, and since the contention of the petitioner and intervenors stands solely upon chemical analysis, and because of other reasons herein stated, their petition must fall.

“To achieve the broad social and economic objectives of the Act, and to place the administration thereof upon a practical basis, we must consider not only chemical analyses, physical structure, and burning characteristics, but also competitive market conditions, uses, and historical circumstances.

“For all practical purposes, the coals produced from the Hartshorne Seam, including the Spadra and adjoining fields and the coals of the petitioner and intervenor, are the same as the coals of their competitors

and all is bituminous coal as contemplated in Section 17 (b) of the Act and we so hold."

It is clear from the above language that the basis of the Commission's decision is that chemical analysis, while important, is not the sole criterion and that other important considerations are the physical structure, burning characteristics, competitive marketing conditions and uses, and historical circumstances. It was on the basis of all these criteria that the Commission reached the conclusion that petitioner's coal is subject to the Act.

In conjunction with the findings and orders, the Commission rendered its opinion (Docket 68 F. D. August 31, 1938) in which it summarized the facts found by it and analyzed and discussed the evidence before it and referred to the court decisions upon which it relied in reaching its conclusions of law.

It appeared to the Commission that Congress had not defined the coals intended to be regulated by the Bituminous Coal Act with such absolute particularity as to leave no room for construction in order to arrive at the true legislative intent. The Commission could not therefore establish "what is bituminous coal" for all cases. It considered the legislative history and the manifest object and purposes of the Act as disclosed in the "Declaration" and several provisions thereof. Its conclusion that the intent of the Act was to exclude from its operation "anthracite" and "lignitic" coals, and that such coals as those produced in Arkansas were within the Act was fully justified.

We are not persuaded that the Commission failed to find the basic facts necessary to the determination that the coal produced by petitioner was bituminous coal within the Act. The Commission was not required to draw a hard and fast line that would be applicable to all future cases in all conceivable circumstances. It found the basic facts applicable to the situation before it and rested its conclusion thereon. That is all that is required of findings of fact made by administrative agencies.

The Supreme Court on occasion has sent cases back to the trial courts because of the failure of such courts to make sufficiently detailed findings of fact. See Interstate Circuit

v. United States, 304 U. S. 55. We know of no case where the Court has refused to pass upon the merits because the findings of fact were too detailed. The most that can be said against the Commission's findings is that they are possibly more detailed than was necessary. Such a defect is not one that caused any injury to the petitioner. As long as the necessary findings are there, the rest can be treated as mere surplusage.

We find that the petitioner was accorded a full, fair and impartial hearing by the Commission, that there was no procedure taken prejudicial to it, that the findings were based on substantial evidence, and that the orders complained of were within the Commission's jurisdiction.

Affirmed.

(6789)

UNITED STATES DISTRICT COURT, EASTERN DISTRICT
OF ARKANSAS, WESTERN DIVISION

In Equity No. 2949.

THE SUNSHINE ANTHRACITE COAL COMPANY,
Plaintiff,
vs.

HOMER M. ADKINS, AS COLLECTOR OF INTERNAL REVENUE
FOR THE DISTRICT OF ARKANSAS,
Defendant.

THE COURT:

We have concluded to avoid the delay that would be entailed by the preparation of a formal opinion in this case, notwithstanding the great importance of the questions presented, because of the comprehensive discussions and analyses of the Bituminous Coal Act and the Act preceding it promulgated in the Carter Coal Company case and in the City of Atlanta vs. Commissioner. We are in accord with the opinion in the latter case and the citations generally control the decision here except as to the specific matter of the 19½ per cent tax of Section 3 (b).

We feel that in this case that we had the benefit of an unusually helpful oral argument in that it seems that the vital and determinative questions were clearly presented and with immediate reference to the decided cases that tend to sustain the various contentions that were made.

Now, we have had submitted to us the proposed and requested findings, we have carefully gone over those re-

quested by the plaintiff and in our determination of the case we find no one of these requested findings that are necessary to sustain the conclusions we have arrived at, or necessary to reflect the testimony in the case. There are some that are incorporated in the findings which we shall adopt and we see no occasion for repetition. All the essential matter that we find should be determined upon the testimony we think is included and properly set forth in the findings that have been submitted on behalf of the defendant together with those additional findings which we have made ourselves. On carefully checking over and examining the proposed findings for the Government, we have made some addition and corrections particularly as to the matter of the state of the plaintiff's property and the value of its assets, etc. The plaintiff has not requested specific detailed findings in that regard, nor do we think it necessary to amplify the matter very much. It has been requested that we find that the plaintiff is the lessee of coal lands in Johnson County, Arkansas, owned by the Ozark Coal Company and leased to plaintiff, under a lease which originally required plaintiff to pay a royalty of twenty-five cents per ton for each ton of coal mined and removed but not less than \$5,000.00 per year. By a supplemental agreement, the royalty has been reduced to fifteen cents a ton while the mine is in the development stage, the minimum royalty still continuing at \$5,000.00 per year. And that part of the finding appears to us to be properly in accord with the allegations and the testimony.

The plaintiff's property is in the development stage at the present time. The tonnage produced and sold has been increased from year to year. In 1939 it was in excess of one hundred thousand tons. There may be a slight inaccuracy in that. There was testimony that between 1937 and 1938 there had not been very much change. The property

the plaintiff is carried on its books at a figure in excess of \$500,000.00 but it is very heavily encumbered. In part, because of the depressed condition of the bituminous coal industry, plaintiff is unable at present to find a purchaser for its property in a free and open market or to borrow money thereon from the bank. And then we have the fact that plaintiff's property has been operated at a loss for the past three years and the actual sale value of its property does not exceed \$30,000.00. Now there were further findings including a finding of the formal matters on which there has been no controversy as to amount of taxes which the defendant has assumed and purported to lay against plaintiff and the dates, manner and so forth, and that the production has continued. The historical matter copied in the stipulation as to the state of the industry has been repeated in the findings, we find that substantially correct except one request was made by the Government for us to find, "That another effect of the situation was that the operators wasted the best of the nation's coal reserve because they were cheap and readily available." We find no testimony directed to that point exactly and we decline to make that finding. Otherwise, the formal matters in the findings are in direct conformity, we think, with the evidence. There is a finding of the effect of the proceedings that have been had before the Commission and before the Appellate Court, as to which we have already indicated, our opinion in writing and the finding here correctly recites the facts of those proceedings.

As to our conclusions of law, we make the formal jurisdictional conclusions. We have a certain jurisdiction, but we do not have jurisdiction to go into the questions already adjudicated by the Commission and by the Court of Appeals. We conclude that the Act is constitutional, that the regulatory provisions are valid exercises of the power of Congress

to regulate commerce, that the procedure for the establishment of prices is within the Constitutional power and sufficient definite standards are indicated. We do not pass on the question of nomenclature of the section that is sought to be given by the plaintiff whether this is a tax or a penalty, but we find it is germane to and adapted to carrying out the purpose of the Act and within the scope of the power of Congress to enact. Now, outside of these findings that have been requested, we have made this finding which is directly, particularly directed to the final order that ought to be entered in this case. It appears to us from the record that the coal company filed its claim for exemption August 31, 1938. The Circuit Court of Appeals affirmed by opinion June 19, 1939. The Supreme Court denied certiorari November 6, 1939. Rehearing was denied by the Supreme Court December 4, 1939. Throughout the period no schedule of prices had been established by the District Board.

The statute Sec. 4-A Paragraph 2 (p. 13) provides that the filing of an application in good faith "shall exempt the applicant from any obligation, duty or liability imposed by Section 4 with respect to the commerce until such time as the Commission shall act upon the application". The exemption may be suspended if there is reason to believe that the exemption during the litigation "is likely to permit evasion of the Act" *id.*

So-called taxes and penalties were attempted to be applied to plaintiff beginning in March, 1938, and running through September, 1939. Although the statute describes the exemption period by reason of the presentation of application for exemption in good faith as extending to the time when the Commission "shall act" thereon, the extent of such exemption is also qualified by exercise of discretion when it appears "likely to permit evasion of the Act". The test may fairly be said to be the likelihood of such evasion.

The due process for protection of plaintiff's rights is accorded by the opportunity for hearing before the Commission and the hearing by the Court of Appeals on appeal. Together, the procedure before the Commission and the court satisfies the due process requirements. We conclude that the discretion vested in the Commission by necessary implication also resides in the court. We think that plaintiff's claim for exemption has been made and diligently prosecuted without delay in good faith and that in view of the fact that no price schedule has been established the plaintiff was in this case entitled to be exempted from the 19½ per cent exaction of the statute until the final action of the Supreme Court denying rehearing on its ruling on certiorari on December 4, 1939. As to the taxes laid and attempted to be collected by defendant under the 19½ per centum provision of the Act prior to said date of December 4, 1939, therefore, the plaintiff is entitled to the injunction prayed for. It is decreed that such taxes up to that time are null and void and their assertion or collection is enjoined.

But from and after said date plaintiff has ceased to be exempt by reason of its application for exemption and litigation in support of such claim. Its bill in equity herein seeking to enjoin defendant from assessing and collecting the amount of 19½ per centum of the sale price of its coals from and after December 4, 1939, is without equity and is dismissed.

But notwithstanding such dismissal, the restraining order heretofore entered herein shall remain operative to prevent assertion or collection of such taxes by defendant for the period of thirty days from the entry hereof to enable the plaintiff to appeal to the Supreme Court. If the plaintiff shall perfect such appeal in said court within said period, the restraining order shall remain in force and shall operate to stay our decree until final disposition of the appeal in

the Supreme Court; otherwise it shall cease to be operative and shall stand revoked at the end of said thirty day period.

Now that seems to us sufficient basis for the clerk to enter a decree in conformity with our decision.

Filed Feb. 16, 1940.

DISTRICT COURT OF THE UNITED STATES OF AMERICA, EASTERN
DISTRICT OF ARKANSAS, WESTERN DIVISION

I, Grady Miller, Clerk of the District Court of the United States for the Eastern District of Arkansas, in the Eighth Circuit, hereby certify that the foregoing writing annexed to this certificate is a true, correct, and compared copy of the original remaining of record in my office, at Little Rock, Arkansas.

In Witness Whereof, I have hereunto set my hand and the seal of said Court, this 18th day of March, in the year of our Lord, one thousand nine hundred and Forty, and of the Independence of the United States of America, the one hundred and Sixty-fourth.

[SEAL.]

GRADY MILLER,
Clerk.

By SUE JONES,
Deputy Clerk.

(6922)

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APR 15 1940

CHARLES CLARK CROPLEY
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1939.

THE SUNSHINE ANTHRACITE COAL
COMPANY,

Appellant,

vs.

HOMER M. ADKINS, as Collector of
Internal Revenue for the District of
Arkansas,

Appellee.

No. 804.

Appeal from the District Court of the United States for the
Eastern District of Arkansas, Western Division.

BRIEF OF APPELLANT.

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The so-called 19½ per cent tax on the sale price of coal is obviously not a tax, but a confiscatory penalty assessed without fault on the part of the appellant. Exemption from such so-called tax is based not upon difference in their conduct or product, but solely upon membership in the Code. Such classification for exemption purposes is clearly unreasonable, arbitrary, discriminatory and capricious, and not in any wise a proper method of accomplishing a proper congressional practice, and violates the Fifth Amendment of the Constitution of the United States. Membership or nonmembership in an organization certainly cannot be a proper basis for classification either for regulation or taxation purposes	32
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IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1939.

THE SUNSHINE ANTHRACITE COAL
COMPANY,

Appellant,

vs.

HOMER M. ADKINS, as Collector of
Internal Revenue for the District of
Arkansas,

Appellee.

No. 804.

Appeal from the District Court of the United States for the
Eastern District of Arkansas, Western Division.

BRIEF OF APPELLANT.

I.

The District Court of the United States for the Eastern District of Arkansas, Western Division, filed no opinion at the time of entering final decree in this case. It did, however, file an opinion at the time of ruling on motion to strike, and this opinion is reported in 31 Fed. Supp. 125 (Advance Sheets).

II.

Jurisdictional statement has heretofore been filed and probable jurisdiction noted by this Court March 25, 1940.

1. The Bill of Complaint is in three paragraphs (R. 1, pp. 1-20, inc., 30-31) and challenges the constitutionality of the Bituminous Coal Act of 1937. It also challenges the construction placed upon said Act by taxing and administrative officers.

2. The order, judgment and decree sought to be reviewed was entered on the 16th day of February, 1940 (R. 1, pp. 50-51). Application for appeal was allowed on March 4, 1940 (R. 1, pp. 119-120).

3. Jurisdiction of this court is invoked under the act of August 24, 1937 [C-754, Section 3—50 Stat. 752, Title 28, U. S. C. A. Section 380 (a) (Pocket Pamphlet)]. Cases believed to sustain jurisdiction of the Supreme Court of the United States are: William Jameson Company, Inc. v. Henry Morgenthau, Jr., Secretary of the Treasury of the United States et al., 307 U. S. 171. International Ladies Garment Workers Union v. Donnelly Garment Co., 304 U. S. 243, 50 Sup. Ct. 675.

III.

CONCISE STATEMENT OF THE CASE.

This case presents questions both of construction and the validity of the Bituminous Coal Act of 1937. The declared purpose of the Act is to regulate the bituminous coal industry. The method of regulation, however, is entirely new and unusual. The Act does not purport to regulate all bituminous coal in interstate commerce, but divides the natural class of bituminous coal into two classes, code

and non-code, then proceeds to regulate the code members and permit the non-code members to go unregulated. Membership in the code is ostensibly voluntary. Non-code members are not prohibited from mining and shipping bituminous coal in any quantity or amount in interstate commerce. Appellant is a non-code member and produces semianthracite coal, and contends that, in any event, the Act is unconstitutional, invalid and void. On May 5, 1938, Appellee filed notice of tax lien, under the Internal Revenue Laws, in the amount of \$15,488.62 (R. 1, pp. 45-46) and on May 9, 1938, Appellant filed in the District Court of the United States for the Eastern District of Arkansas, Western Division, petition to enjoin Appellee from attempting to enforce tax liability against Appellant. On June 3, 1938, after hearing by three-judge court, temporary injunction was issued restraining collection of the nineteen and one-half per cent tax levied by section 3 (b) of the Act (R. 1, pp. 26-27). By agreement with the court at that time Appellant has been paying, under protest, the one cent per ton tax levied by section 3 (a) of the Act. Appellee set up by way of answer in bar on the question of whether or not plaintiff's coal came within the purview of the statute, proceedings, findings and order or decree of the National Bituminous Coal Commission entered on hearing of petition for exemption by Appellant, and general investigation of coals in the Spadra coal field, Johnson County, Arkansas, determining that coal produced by plaintiff and by producers in the Spadra field was bituminous coal within the meaning of the Act (R. 1, pp. 21 to 26, 27 to 28, 39 to 40). This was an ex parte proceedings and Appellee was not a party to these proceedings. Appellant filed a motion to strike out all of that portion of the answer setting up and alleging above proceedings (R. 1, pp. 28 to 29), which said motion to strike was overruled by the three-judge court (R. 1, p. 31), and written opinion

filed therewith (R. 1, pp. 32 to 39), in which said opinion it was held that the proceedings before the National Bituminous Coal Commission were conclusive on the court in that hearing. Trial on the merits was held February 15th and 16th, 1940; at the trial Appellant offered evidence of Dr. George C. Branner, State Geologist of the State of Arkansas, as to qualifications, experience with and personal knowledge of the kind and quality of coal produced by Appellant, the technical meaning of the terms "bituminous, semi-bituminous and sub-bituminous coal," and the nature characteristics and history of the Spadra coal field (R. 1, pp. 108-112).. Appellant also offered evidence of Dr. Arno Fieldner, Chief Technological Branch and Chief Engineer Coal Division of the Bureau of Mines (R. 1, pp. 71 to 81), and Thomas A. Hendrichs, Geologist with the Geological Survey, United States Department of the Interior (R. 1, pp. 82 to 85), and analyses and official government publications and bulletins as to classification of coal produced by plaintiff (R. 1, pp. 85 to 105). All of the above evidence was by the court excluded on the ground that that question had been conclusively determined by the Bituminous Coal Commission in the Circuit Court of Appeals for the Eighth Circuit in the case of Sunshine Anthracite Coal Company against the National Bituminous Coal Commission, 105 Fed. (2d) 559. The Court, on February 16, 1940, filed in the above cause its Findings of Fact and Conclusions of Law (R. 1, pp. 49 to 50) and entered final judgment and decree (R. 1, pp. 50-51). The unreasonable, excessive and confiscatory nature of the so-called tax is obvious, and the Court found that Appellant had operated its property at a loss for the past three years (R. 1, p. 45) and could neither sell the property nor borrow money to pay the tax (R. 1, p. 45) and, at the time of entering said final decree, continued the injunction in force and effect for the period of thirty days from the entry of the decree to enable Appel-

lant to appeal to the Supreme Court of the United States, with a provision that if such appeal shall be perfected within said thirty day period, that said restraining order against the defendant shall remain in full force and effect until final disposition of said appeal. By its conclusions of law (R. 1, p. 49) the trial court held that the proceedings before the National Bituminous Coal Commission were conclusive on the court; that the so-called 19½ per cent tax levied by section 3 (b) of said Act was applicable to coal produced by plaintiff, although plaintiff was non-code member and that said Act was a constitutional and valid regulation of the coal industry, is reasonable and related to a proper congressional purpose, and does not violate the Fifth Amendment and contains no invalid delegation of legislative authority; that the taxing provisions of the Act are valid as affecting the valid regulatory purpose of the Act, and that the exception provided in section 3 (b) of producers who subscribe to the Bituminous Coal Code and are subject to the regulatory provisions of section 4, does not constitute an arbitrary classification contravening the Fifth Amendment.

IV.

Statute involved is the Bituminous Coal Act of 1937. For convenience, copy of the Act, omitting annex "Schedule of Districts," is attached to this brief as an appendix. Summary of the Act, with quotation of particular provisions involved in this litigation, is contained in the jurisdictional statement.

V.

**SPECIFICATION OF ASSIGNED ERRORS INTENDED
TO BE URGED.**

Appellant intends to urge all of the errors set forth in its Assignment of Errors, as follows:

“The three-judge District Court erred:

“1. In overruling plaintiff's motion to strike out of Defendant's answer those paragraphs of defendant's answer setting up and alleging proceedings, findings and order before the National Bituminous Coal Commission determining that plaintiff's coal and all coals produced in the Spadra field in Johnson County, Arkansas, to be bituminous coal within the meaning of the Bituminous Coal Act of 1937.

“2. In excluding, upon objection, plaintiff's evidence of characteristics, nature and prior technical meaning given to the words 'bituminous, semi-bituminous and sub-bituminous' by other departments of the government of the United States, and by the former National Bituminous Coal Commission.

“3. In admitting in evidence, over plaintiff's objection, certified transcript of proceedings had and held before the National Bituminous Coal Commission for the purpose of determining whether or not certain coals in the State of Arkansas are subject to the provisions of the Bituminous Coal Act of 1937, and for the purpose of hearing applications for exemption, including that filed by The Sunshine Anthracite Coal Company.

“4. In holding, in Conclusion of Law No. 3, that the District Court had no jurisdiction to determine whether 'Plaintiff's coal is bituminous coal,' as defined by the Bituminous Coal Act of 1937. Under section 4-A and section 6 of the Act, the findings and order of the National Bituminous Coal Commission declared plaintiff's coal to be 'bituminous coal' within

the meaning of the Act, was an order which the Commission had jurisdiction to make, and which can be reviewed only by a Circuit Court of Appeals.

"5. In holding, in Conclusion of Law No. 4, that in any event the issue whether plaintiff's coal is 'bituminous coal' as defined by the Act has already been conclusively determined against plaintiff by a former proceeding in which the National Bituminous Coal Commission denied plaintiff's application for exemption from the Act.

"6. In holding, in its Conclusion of Law No. 5, that section 3 (b) of the Act imposes a tax upon producers of bituminous coal in interstate commerce who do not subscribe to the Bituminous Coal Code.

"7. In holding, in its Conclusion of Law No. 6, that the Bituminous Coal Act of 1937, c. 127, 75th Congress, first session, 250 Statutes 72, is constitutional.

"8. In holding, in its Conclusion of Law 6 (a), that the regulatory provisions in section 4 of the Bituminous Coal Act of 1937 are a valid exercise of the power of Congress to regulate interstate commerce and intrastate commerce directly affecting interstate commerce.

"9. In holding, in its Conclusion of Law 6 (b), that the establishment of prices for bituminous coal sold in interstate commerce or intrastate commerce directly affecting interstate commerce is reasonable, is related to a proper congressional purpose and does not violate the Fifth Amendment.

"10. In holding, in its Conclusion of Law 6 (c); that the standards of the Bituminous Coal Act of 1937 are sufficiently definite, and that said act contains no invalid delegation of legislative authority.

"11. In holding, in its Conclusion of Law 6 (d), that whether or not the taxing provisions of section 3 (b) could be otherwise sustained, since the regulatory provisions of the act are valid, the taxing provisions of the act are likewise valid as affecting the valid regulatory purpose of the act.

"12. In holding, in its Conclusion of Law 6 (e), that

the exemption from the tax imposed by section 3 (b) of the producers who subscribe to the Bituminous Coal Code, and are subject to the regulatory provisions of section 4, does not constitute an arbitrary classification contravening the Fifth Amendment.

"13. In holding, in its Conclusion of Law No. 7, that the bill of complaint should be dismissed.

"14. In refusing to make the temporary injunction heretofore granted permanent."

VI.

SUMMARY OF ARGUMENT.

POINT 1.

Proceedings before the National Bituminous Coal Commission in the matter of the Investigation to Determine whether or not certain coals in the State of Arkansas are subject to the provisions of the Bituminous Coal Act of 1937, and for the further purpose of hearing applications for exemption, as provided for by orders Nos. 28 and 53, and in the matter of the application of Sunshine Anthracite Coal Company for exemption under subsection (b) of section 17, of the Bituminous Coal Act of 1937 et al., are not conclusive on the court, and are not admissible in evidence in this case for the following reasons:

(a) This is not a petition to review an order, judgment or decree of the National Bituminous Coal Commission. Taxes levied under section 3 of the Act (now levied under Chapter 33 of Internal Revenue Code of 1939) are levied, assessed and collected by the Commissioner of Internal Revenue in like manner as other governmental taxes. Levy, assessment and collection by Commissioner of Internal Revenue is not in anywise dependent on action by the National Bituminous Coal Commission or its successor.

This case, therefore, does not challenge either directly or indirectly any order of the Commission, and, in any event, there is no privity between the National Bituminous Coal Commission or its successor and the Appellee herein.

(b) No power to hold hearing and make determination of what is or is not bituminous coal within the meaning of the Bituminous Coal Act of 1937 is delegated by said Act, either directly or inferentially, to the National Bituminous Coal Commission or its successor.

(c) If statute be construed as delegating to National Bituminous Coal Commission or its successor power to determine the object to which law is to be applied, without standard fixed, it renders statute invalid as unlawful delegation of legislative power.

(d) If statute be construed as delegating power to exercise the judicial function of construction of the Act, such delegation renders the statute invalid as an unlawful delegation of judicial power.

(e) Construction of the act as to the meaning of "bituminous, semi-bituminous and sub-bituminous" is a judicial function and cannot be delegated to an administrative tribunal.

POINT 2.

Section 3¹(b) of the Act levies the so-called tax of 19½ per cent on "the sale or other disposal of bituminous coal produced within the United States, when sold or otherwise disposed of by the producer thereof, which would be subject to the application of the conditions and provisions of the Code provided for in section 4, or of the provisions of section 4-A." Since Appellant is a noncode producer, sale of Appellant's coal is not subject to the application or provisions of the Code provided for in section 4 or of the

provisions of section 4-A, and therefore is not subject to the so-called 19½ per cent tax.

POINT 3.

Bituminous Coal Act of 1937 is unconstitutional, invalid and void for the following reasons:

- (a) "The division of a natural class, bituminous coal, into artificial classes of code and non-code for regulatory purposes is unreasonable, arbitrary, discriminatory, and capricious, and, therefore, illegal and in violation of the Fifth Amendment of the Constitution of the United States."
- (b) The so-called 19½ per cent tax on sale price of coal is obviously not a tax, but a confiscatory penalty assessed without fault on the part of the Appellant. Exemption from said so-called tax is based not upon difference in either conduct or product, but solely upon membership in the code. Such classification for exemption purposes is clearly unreasonable, arbitrary, discriminatory and capricious, and not in any wise a proper method of accomplishing a proper congressional purpose, and violates the Fifth Amendment to the Constitution of the United States. Membership or nonmembership in an organization certainly cannot be a proper basis for classification either for regulation or taxation purposes.
- (c) Congress is without power to fix minimum prices for Bituminous Coal sold in interstate commerce.

VII.

ARGUMENT.

POINT 1.

Assignment of errors Nos. 1 to 5, inclusive, present the single question of whether or not proceedings before the National Bituminous Coal Commission were conclusive on the trial court, and will be considered together.

The Record.

In order to direct the Court's attention to that part of the record presenting the first five assignments of error, we make the following statement of the record:

Appellee filed answer (R. 1, pp. 21 to 26), first supplemental answer (R. 1, pp. 27-28), and supplemental answer to third paragraph (R. 1, pp. 39-40). Said answers denied the essential allegations of the complaint, and in addition, in paragraphs 30 to 37, set up as conclusive on trial court proceedings before the National Bituminous Coal Commission (R. 1, pp. 24-28). Plaintiff filed motion to strike all of said paragraphs setting up said proceedings (R. 1, pp. 28-29), which motion was overruled by the Court (R. 1, p. 31). At the trial of said cause evidence was offered and, upon objection, excluded by the Court, as follows: Expert evidence as to technical meaning, history, nature, characteristics and prior definition of the term "bituminous, semi-bituminous and sub-bituminous" of Dr. George C. Branner (R. 1, pp. 108-112), Arno Fieldner (R. 1, pp. 71-81), Thomas A. Hendrichs (R. 1, pp. 82-85); also Appellant offered chemical analysis of coal produced by Appellant (R. 1, pp. 85-86; R. 2, pp. 25-30), official government bulletins showing classification of Appellant's coal prior to Bituminous Coal Act of 1937 (R. 1, pp. 86-98),

and order of National Bituminous Coal Commission organized under the Act of 1935 construing the words "bituminous, semi-bituminous and sub-bituminous coal" as used in the Act of 1935 (R. 1, pp. 98-103). Objection in each instance was substantially as follows:

"We object to the introduction of this evidence on the ground that all of it goes to the question of the character of the plaintiff's coal, and that question has been conclusively determined by the Bituminous Coal Commission in the Circuit Court of Appeals for the Eighth Circuit in the case of Sunshine Anthracite Coal Company against the National Bituminous Coal Commission, 105 Fed. (2d) 559, and it is outside of the scope of the issues before this Court as determined in its decision on January 8, 1940" (R. 1, p. 71).

Appellee offered in evidence certified copy of the transcript of the record in the case of the Sunshine Anthracite Coal Company v. Harold L. Ickes (R. 1, p. 112, all of Vol. 2), and over Appellant's objection same was admitted and read in evidence (R. 1, p. 113). The Court's conclusions of law Nos. 3 and 4 (R. 1, p. 49) present the same question.

**This Is Not a Petition to Review an Order, Judgment or
Decree of the National Bituminous
Coal Commission.**

The so-called taxes herein involved were levied under section 3 of the Bituminous Coal Act of 1937. (This section has been repealed and the taxes are now levied by virtue of Chapter 33, sections 3520 to 3528, inclusive, of the Internal Revenue Code of 1939 [U. S. C. A., Title 26, Secs. 3520-3528, 53 Stat. 430].) Specific provisions of the law require that the taxes be assessed and collected by the Commissioner of Internal Revenue "Under such regulations and in such manner as shall be prescribed by the

Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury." All of the taxing provisions are contained in section 3 of the Act, and the sole duty of the National Bituminous Coal Commission or its successor in connection with the assessing or collecting of the tax is contained in section 3 (b) of such Act, and reads as follows:

"In the case of any producer who is a Code member as provided in section 4, or is so certified to the Commissioner of Internal Revenue by the Commission, the sale or disposal by such producer during the continuance of his membership in the Code of coal produced by him shall be exempt from the tax imposed by this sub-section."

By the terms of the Act the tax is assessed and collected in the same manner and by the same department as collects other governmental taxes, with the same power to the tax gathering department to adopt its own regulations. The original tax involved in this litigation was assessed by the Commissioner of Internal Revenue; on May 3, 1938, Appellee served notice of taxes on Appellant; on May 5, 1938, filed a lien for the taxes under the Internal Revenue laws. At that time no action of any kind or nature had been taken by the National Bituminous Coal Commission, and none was taken by the Commission until August 31, 1938. Clearly, it was the intent of Congress that these so-called taxes should be assessed and collected in like manner as other government revenues. It would seem utterly impossible to gather from these provisions any intent on the part of Congress to make the Secretary of the Treasury or the Commissioner of Internal Revenue, or the tax gathering department of the government in any wise subordinate to or dependent upon any action of the Commission or its successor. The intent is clearly demonstrated by the fact that Congress in the Revenue Act of 1939,

Chapter 33, sections 3520 to 3528, inclusive, repealed section 3 of the Bituminous Coal Act of 1937, and re-enacted the taxing provisions as a part of the Internal Revenue Code of 1939. It seems obvious, therefore, that these so-called taxes are neither levied, assessed nor collected by reason of any order or finding of the National Bituminous Coal Commission or its successor, and this cause is neither a direct nor collateral attack upon any finding or order of the Commission or its successor. Clearly, the Commissioner of Internal Revenue did not construe the Act as requiring any action on the part of the National Bituminous Coal Commission before the tax was assessed.

If the proceedings before the National Bituminous Coal Commission set up in the answer are conclusive on the trial court in this case, it must be by reason of the doctrine of res judicata. In order that a judgment may work an estoppel under that doctrine, three essentials must be present: (1) parties must be the same; (2) subject matter must be the same; (3) the Court or tribunal rendering the judgment must have jurisdiction of the cause. In the case now under consideration not one of these essential requirements is present.

Parties Not the Same.

That the parties in the proceedings before the National Bituminous Coal Commission and in this cause were not the same is obvious. Appellee contends, however, that privity existed between the National Bituminous Coal Commission and the Appellee. This is seemingly based upon the contention that the powers conferred upon the Secretary of the Treasury and the Commissioner of Internal Revenue (and subordinately upon the Appellee) with respect to the tax levied by section 3 of the Bituminous Coal Act are in some manner dependent upon determination of plaintiff's status by the Commission. There is nothing

expressly to that effect in the Act, and we are at a loss to find anything that could be inferentially thus construed. The taxes are assessed under the express provisions of the statute by the Commissioner of Internal Revenue under his own regulations, and collected in like manner as other taxes are collected.

This is a personal suit against Appellee, and any judgment rendered herein would not be res judicata against the Secretary of the Treasury, the United States or the Commissioner of Internal Revenue (Sage v. United States, 250 U. S. 33; United States v. Stone & Donner Co., 274 U. S. 225; Bankers Pocahontas Coal Co. v. Burnett, 287 U. S. 308; Tait v. Western Maryland Railway Co., 289 U. S. 620). In the case of Bankers Pocahontas Coal Company v. Burnett, supra, it was contended that a judgment in the District Court for Northern West Virginia against the Collector of Internal Revenue was res judicata in a suit against the Commissioner of Internal Revenue, and the Court said:

“With respect to this contention it is sufficient to say that the suit in the District Court was not against the Commissioner of Internal Revenue, the respondent here, but against the Collector, judgment against whom is not res judicata against the Commissioner or the United States.”

The later case of Tait v. Western Maryland Railway Co., supra, at page 637, approved the rule laid down in the above cause and made the following comment:

“We think, however, that where question has been adjudged as between a taxpayer and the government or its official agent, the Commissioner, the Collector being an **official inferior in authority,**¹ and acting **under them,** is in such privity with them that he is estopped by the judgment.”

¹This and all other emphasis in the brief are ours.

Certainly there can be no privity found between the Appellee herein, charged with the gathering of the taxes, and an administrative board in a separate and independent department of the government, charged with the regulation of Code members producing bituminous coal.

Subject Matter Not the Same.

Section 4 of the Act limits the regulatory powers of the National Bituminous Coal Commission and its successor as follows:

“Producers accepting membership in the Code as provided in section 5 (a) shall be, and are herein referred to as, Code Members, and the provisions of such Code shall apply **only to such Code Members**, except as otherwise provided by subsection (h) of part 2 of this section.”

The exception contained in the above clause is inapplicable to the present case. The jurisdiction of the Board as to regulation of the bituminous coal industry, therefore, depends upon two things: First, the coal must be bituminous coal, and, second, the coal must be produced by a producer who has accepted membership in the Code. It is to be remembered that the Appellant herein is a non-code member and, therefore, by the express terms of the statute, not subject to the regulatory powers of the Commission. It is also to be remembered that the taxes under the terms of the Act are levied and collected by the Commissioner of Internal Revenue under his own regulations, subject to the approval of the Secretary of the Treasury. No question of Appellant's liability for taxes was either involved or decided in the proceedings set up in Appellee's answer, and we think no such question could have been involved or decided in these proceedings. (See *Larison v. North End Transportation Co.*, 292 U. S. 20.) If decision had been otherwise

it would not have been binding on the Commissioner of Internal Revenue.

Bituminous Coal Commission Was Without Power to Hold Hearing and Make Determination of What Is or Is Not Bituminous Coal Within the Meaning of the Bituminous Coal Act of 1937.

The Commission acquired only such powers as might be either directly or inferentially conferred upon it by the Act. No express power being delegated by the Act, Appellee relies upon two provisions of the Bituminous Coal Act of 1937 as conferring jurisdiction upon the Commission. The first of such provisions is in section 2(a) of the Act and reads as follows:

“Such Commission shall have the power to make and promulgate all reasonable rules and regulations for carrying out the provisions of this Act, and shall annually make full report of its activities to the Secretary of the Interior for transmission to Congress.”

And a further provision in the same section, as follows:

“No order which is subject to judicial review under section 6, and no rule or regulation which has the force and effect of law, shall be made or prescribed by the Commission, unless it has given reasonable public notice of a hearing, and unless it has afforded to interested parties an opportunity to be heard, and unless it has made findings of fact. Such findings, if supported by substantial evidence, shall be conclusive upon review thereof by any court of the United States.”

The second of such provisions is found on section 4-A of the Act and reads as follows:

“Any producer believing that any commerce in coal is not subject to the provisions of section 4 or of the provisions of the first paragraph of this section, may

file with the Commission an application, verified by oath or affirmation for exemption, setting forth the facts upon which claim is based."

It is interesting to note that the asserted power under the latter clause was not discovered until after the power of the Commission was questioned. With reference to the first of these provisions:

The National Bituminous Coal Commission in its Order No. 28 (R. 2, p. 1) expressly stated that under its power to make and promulgate reasonable rules and regulations it was providing a method whereby producers of coal might secure a determination of their status under the Bituminous Coal Act of 1937. Appellant herein, without accepting the Code, and in conformity with said Order, filed a petition for exemption on the ground that its coal was not bituminous coal. Commission by its Order No. 53 (R. 2, p. 5) fixed a public hearing for the purpose of determining whether or not certain coals in the State of Arkansas were subject to the provisions of the Bituminous Coal Act of 1937, and to hear and determine at the same time all Arkansas applications for exemption, and on the 31st day of August, 1938, after hearing, entered what is designated "An order overruling plaintiff's petition for exemption" (R. 2, pp. 67-68). It is apparent that Order No. 28 was not in the nature of a regulation for the purpose of filling in any of the details of a power granted the Commission or its successor by the terms of the Act. The effect of the so-called regulation was to extend the power of the Commission to a special, specific inquiry and conclusive determination of the object to which the provisions of the act itself are to be applied. The general grant to adopt rules and regulations has never before been thus broadly construed, and the power of the Commission or its successor cannot be thus broadly extended (*International Railway Co. v. Davidson*, 257 U. S. 506; *Man-*

hattan General Equipment Co. v. Commissioner of Internal Revenue, 297 U. S. 129; Koshland v. Helvering, 298 U. S. 441; United States v. Idaho, 298 U. S. 105): It is well settled by this Court that if the Act did not grant authority asserted by the Board, the filing of the ex parte petition by the Appellant would not confer jurisdiction (McNutt et al. v. General Motors Acceptance Corporation, 298 U. S. 178; United States v. Corrick, 298 U. S. 435).

The other source of alleged power of the Commission, the power to exempt, is contained in the same section, with a specific grant to hold hearings and determine the effect of the sale of bituminous coal in intrastate commerce on interstate commerce, and this power of exemption is confined to exempting from the provisions of section 4 (the Code) or the provisions of the first paragraph of section 4-A. This section fixes no standard to be followed by the Commission in the granting of exemptions. If this be construed as a general power to exempt without limitation, wholly at their own discretion, then this would clearly be an invalid delegation of legislative power (Panama Refining Co. v. Ryan, 293 U. S. 388; Schechter v. United States, 295 U. S. 495; Holgate Bros. Co. v. Bashore, ... Pa. ..., 200 Atl. 672).

It would be rather absurd to construe the Act as giving to the Commission power to except from the provisions of the Code coal that did not come within the provisions of the Code. The law itself makes this exception.

It is the contention of the Appellant that the construction and interpretation of the Act is ultimately for the Court. The purpose of the Court in construing the Act is to arrive at the intent of Congress, but this intent must be gathered from the words in the Act itself. In arriving at intent, the Court has a right to take into consideration certain helpful rules of construction, and Congress is assumed to have known these rules and legislated with

that knowledge. In the Act under consideration, Congress defines coal as "bituminous, semibituminous and subbituminous coal." Obviously, there is an ambiguity, even in the definition. The inquiry by this Court is to the intent of Congress in the use of those words. To determine the meaning, the Court has a right to look to the letter of the statute, to the circumstances under which it was enacted, to other statutes, to the mischief to be remedied, and to matters of general knowledge, and any other source which, according to the rules of construction, might throw light on the intent of Congress. The Court should make this construction from the Act itself, if possible, and evidence is received by the Court solely for the purpose of assisting it in the discharge of its judicial functions. In *Crowell v. Benson*, 285 U. S. 22, this Court said:

"In cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function. The case of confiscation is illustrative, the ultimate conclusion almost invariably depending upon the decisions of questions of fact. This Court has held the owner to be entitled to 'A fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both the law and facts.' "

The unreasonable, excessive and confiscatory nature of the so-called tax of 19½ per cent of the sale price of coal is obvious, and would seem to be determinative of the right of the Appellant to have had a trial de novo in this case, even if this were a petition to review. (See, also, *State Corporation of Kansas v. Wichita Gas Co.*, 290 U. S. 561; *B. & O. Ry. Co. v. United States*, 298 U. S. 349; *United States Gas Public Service Co. v. Texas*, 303 U. S. 123; *South Chicago Coal & Dock Co. v. Bassett*, 104 Fed. [2d]

522-525; Ohio Valley Water Co. v. Ben Avon, 253 U. S. 287.)

If Statute Be Construed as Delegating Power to Determine the Object to Which Law Is to Be Applied, Without Fixing Standard, Statute Invalid as Unlawful Delegation of Legislative Power.

The Bituminous Coal Act of 1937 declares that regulation of the sale and distribution in interstate commerce of bituminous coal is imperative for the protection of such commerce; in section 17 (b) the Act defines the term "bituminous coal" in the following language:

"The term 'bituminous coal' includes all bituminous, semi-bituminous and sub-bituminous coal, and shall exclude lignite, which is defined as a lignitic coal having calorific value in British thermal units of less than seventy-six hundred per pound and having a natural moisture content in place in the mine of thirty percentum or more."

The purpose of a definition is to clarify. Congress did in this definition make certain as to the exemption of lignitic coal by fixing a definite standard of yardstick for the determination of what is or is not lignitic coal. Obviously, however, although definition could be certain, there is no certainty as to what Congress intended by the use of the term "bituminous, semi-bituminous and sub-bituminous coal." If the object to which the law is to be applied is so indefinite of meaning as to be incapable of ascertainment, then the law becomes invalid for uncertainty. The Supreme Court of Illinois in Vallat v. Radio Dial Co., 360 Ill. 407, lays down the following rule:

"In order that a statute may be held valid, the duty imposed by it must be prescribed in terms definite enough to serve as a guide to those who have the duty imposed upon them. Such definiteness may be

produced by words which have a technical or other special meaning well enough known to permit compliance therewith, or words which have an established meaning at common law through decision; but if the duty is imposed by statute through the use of words which have not yet acquired definiteness or certainty, and which are so general and indefinite that they furnish no such guide, the statute must be declared to be invalid. When it leaves the legislature the law must be complete in all its terms, and it must be definite and certain enough to enable every person, by reading the law, to know what his rights and obligations are and how the law will operate when put into execution. * * * If the statute leaves it to a ministerial officer to define the thing to which the statute is to be applied, and if the definition is not commonly known in the modes already pointed out, the Act becomes invalid, because it creates an unwarranted and void delegation of legislative power."

As construed by the lower court, the terms used in the Act have no established meaning at common law and no technical or other special meaning well enough known to permit definite application; no standard for determining what is or is not bituminous coal is fixed by the Act; the Commission apparently construes the Act to permit them to make determination, according to their own discretion, in each particular case; such a construction of the statute would clearly be a delegation of legislative power and render the statute invalid. Many statutes have been upheld by this court against the challenge of uncertainty, but in all of these cases a standard of some sort has been afforded by the law. (See *Connally v. General Construction Co.*, 269 U. S. 385; *Hygrade Provision Co., Inc., v. Sherman*, 266 U. S. 497; *Nash v. United States*, 229 U. S. 373; *International Harvester Co. of America v. Kentucky*, 234 U. S. 216; *United States v. Cohen Grocery Co.*, 255 U. S. 81; *Buttfield v. Stranahan*, 192 U. S. 470.)

If Statute Be Construed as Delegating Power to Exercise Judicial Function, Such Delegation Renders the Statute Invalid as an Unlawful Delegation of Judicial Power.

Construction of the Act as to the Meaning of "Bituminous, Semi-Bituminous and Sub-Bituminous" Is a Judicial Function and Cannot Be Delegated to an Administrative Tribunal.

That the construction of this Act is a judicial function can scarcely be denied. That the Commission construed the Act as delegating to them the judicial function of interpretation is undeniably indicated by the opinion filed by the Commission. In the course of that opinion the Commission uses the following language:

"Apparently the provisions of the Act defining the coals intended to be regulated are not free from ambiguity and are, therefore, open to construction. When the meaning of terms used in a statute are ambiguous, or when doubt is cast upon them by a construction attempted to be placed upon them, it is permissible to resort to the legislative history of the law to ascertain the true intent of the legislature" (R. 2, p. 60).

And a little later in the same opinion they make a strictly judicial interpretation and construction of the Act in the following language:

"It follows, therefore, that by the use of the term 'Semi-bituminous' in the Act, Congress intended to deal with super-bituminous coal, and we hold that semi-bituminous coal is super-bituminous coal, and that the term semi-bituminous and semi-anthracite, when applied in determining the rank of coals for the purposes of regulation under the Act are synonymous terms and must be considered one and the same" (R. 2, pp. 61-62).

These statements give form and color to the proceedings and the findings before the Commission. Obviously, they were engaged in the judicial construction and interpretation of the Act, and not in the finding of facts such as might be delegated to an administrative body. The findings and order are clearly based upon a construction of the Act to the effect that semi-bituminous is synonymous with semi-anthracite. Such a construction would clearly render the Act invalid as an illegal delegation of the judicial function. In *Crowell v. Benson*, 285 U. S. 22, this Court made the following statement:

"In relation to these basic facts, the question is not the ordinary one as to the propriety of provision for administrative determinations. Nor have we simply the question of due process in relation to notice and hearing. It is rather a question of the appropriate maintenance of the Federal judicial power in requiring the observance of constitutional restrictions. It is the question whether the Congress may substitute for constitutional courts, in which the judicial power of the United States is vested, an administrative agency—in this instance a single deputy commissioner—for the final determination of the existence of the facts upon which the enforcement of the constitutional rights of the citizen depend. The recognition of the utility and convenience of administrative agencies for the investigation and finding of facts within their proper province, and the support of their authorized action, does not require the conclusion that there is no limitation of their use, and that the Congress could completely oust the courts of all determinations of fact by vesting the authority to make them with finality in its own instrumentalities or in the Executive Department. That would be to sap the judicial power as it exists under the Federal Constitution, and to establish a government of a bureaucratic character alien to our system, wherever fundamental rights depend, as not infrequently they do de-

pend, upon the facts, and finality as to facts becomes in effect finality in law."

It would seem obvious that no power was delegated to the Commission to make conclusive determination as to what is or is not bituminous coal within the meaning of the Act. It would seem equally obvious that an attempt on the part of Congress to delegate such authority to the Commission would be invalid and void as an unlawful delegation of judicial power.

Evidence was offered and rejected by the Court that appellant's coal and other coals in the Spadra field have been sold and marketed for more than a quarter of a century as semi-anthracite coal. The Bureau of Mines and Geological Survey of the Department of the Interior have classified coal from the Spadra field as semi-anthracite from the time of its discovery. The Fuel Administrator in 1918 classified Spadra as anthracite coal, and the National Bituminous Coal Commission, under the Coal Act of 1935, classified similar coal as anthracite. We believe that the Court may take judicial knowledge of these facts. This creates the paradoxical situation of every government department classifying Appellant's coal as anthracite or semi-anthracite, save and except the National Bituminous Coal Commission.

**Shields v. Utah Idaho Central Railroad Co.,
305 U. S. 177;**

**Rochester Telephone Corporation v. United States
of America and Federal Communications
Commission, 307 U. S. 125.**

Appellee has heretofore relied very strongly upon the above cases. Neither of these cases is analogous or controlling.

The Shields case was treated by this court as a review

of proceedings before the Interstate Commerce Commission. The authority to hear and determine was express. All of the parties affected by the order were parties to the proceedings and participated in the hearing. The finding and order subjected the railroad to the requirements of the Railway Labor Act, and the suit to enjoin was an attack upon the order, by virtue of which they were made subject to the requirements of the Railway Labor Act. The Rochester Telephone Company case, supra, was a statutory review of an order made by the Federal Communications Commission under express authority, and all of the parties affected by the order were present and participated in the proceedings before the administrative board. These cases can be no authority in a case such as the present case, wherein no express authority is delegated, and the parties alleged to be affected were not parties to the proceedings before administrative board, and the order entered does not in anywise affect the questions presented.

POINT 2.

Section 3 (a) of the Bituminous Coal Act of 1937 (Now Sec. 3520, Internal Revenue Code 1939, 53 Stat. 430, 26 U. S. C. A. 3520a) imposes a tax of one cent per ton "Upon the sale or other disposal of bituminous coal." This is apt language and undoubtedly imposes the tax upon the sale of all bituminous coal produced within the United States when sold or otherwise disposed of by the producer thereof. Section 3 (b) imposes an additional so-called tax of 19½ per centum of the sale price in the following language:

"In addition to the tax imposed by subsection (a) of this section, there is hereby imposed upon the sale or other disposal of bituminous coal produced within

the United States, when sold or otherwise disposed of by the producer thereof, which would be subject to the application of the conditions and provisions of the code provided for in section 4, or of the provisions of section 4-A, an excise tax in an amount equal to 19½ per centum of the sale price at the mine in the case of coal disposed of by sale at the mine, or in the case of coal disposed of otherwise than by sale at the mine, and coal sold otherwise than through an arms' length transaction, 19½ per centum of the fair market value of such coal at the time of such disposal or sale. In the case of any producer who is a code member as provided in section 4 and is so certified to the Commissioner of Internal Revenue by the Commission, the sale or disposal by such producer during the continuance of his membership in the code of coal produced by him shall be exempt from the tax imposed by this subsection."

The imposition of the tax is in plain English, and the tax is expressly imposed upon the sale or other disposal of bituminous coal when sold or otherwise disposed of by the producer thereof, **"which would be subject to the application of the conditions and provisions of the Code provided in section 4, or of the provisions of section 4-A."**

The object of the tax is clearly not the sale of all bituminous coal produced within the United States, but only the sale of such bituminous coal as would be subject to the application of the conditions and provisions of the Code provided for in section 4 or of the provisions of section 4-A. By the express provisions of section 4, application of the Code is limited to Code members in the following language:

"And the provisions of such Code shall apply only to such Code members."

In other words, the sale of coal produced by a noncode producer such as the Appellant is not subject to the application of the provisions of the Code, and, therefore, not

subject to the tax under this provision of section 3 (b). It is worthy of note that the language in section 4 of the Act is that the Code "Shall apply only to such Code members," and in the taxing section of the Act the language is "subject to the application" of the Code.

It is also instructive to note that section 3 of the Bituminous Coal Conservation Act of 1935, c. 824, 49 Stat. 991, imposed the so-called tax on "the sale or other disposal of all bituminous coal." In re-enacting the Act Congress evidently intended to change the method of taxation in the Bituminous Coal Act of 1937. Substantially the same language as that used in the 1935 Act is employed in imposing the one cent per ton tax under section 3 (a) of the Act under consideration, but entirely different language is used in the imposition of the so-called tax of 19½ per centum of the sale price. This would clearly indicate an intent to change the object of the imposition of the tax¹

The first section of section 4-A reads as follows:

"Whenever the Commission upon investigation instituted upon its own motion or upon petition of any code member, district board, State or political subdivision thereof, or the consumers' counsel, after hearing finds that transactions in coal in intrastate commerce by any person or in any locality cause any undue or unreasonable advantage, preference, or prejudice as between persons and localities in such commerce on the one hand and interstate commerce in coal on the other hand, or any undue, unreasonable, or unjust discrimination against interstate commerce in coal, or in any manner directly affect interstate commerce in coal, the Commission shall by order so declare and thereafter coal sold, delivered or offered for sale in such intrastate commerce shall be subject to the provisions of section 4."

¹ Cf. *United States v. McClure*, 305 U. S. 472.

Certainly nothing in this section would even suggest that the coal produced by Appellant was subject to the application of the conditions and provisions therein contained. This section merely gives express power to the Commission or its successor to declare, after hearing, that bituminous coal produced and sold in intrastate commerce directly affects interstate commerce, and will be subject to the regulatory powers of the Commission or its successor if and when they accept the Code.

The object of the tax being designated in unambiguous language, it would seem that no construction was necessary, nothing left to the court but to apply the law as written. The District Court in its Conclusion of Law No. 5 (R. 1, p. 49) held that section 3 (b) imposes a tax upon noncode producers of bituminous coal. The basis for this conclusion is not clear and is rather difficult to ascertain. True, the second section of the Act does exempt Code members from the imposition of this tax if they are certified as Code members to the Commissioner of Internal Revenue by the Commission, but this does not change the meaning of the words used by Congress in the imposition of the tax. Clearly; the Court construes this subsection as imposing a tax on the sale of all bituminous coal produced within the United States except coal produced by a Code member. To say that would involve not a construction of the Act but a rewriting of it.² Assuming, arguendo, that this was the intent and that a mistake had been made in the choice of language used, it is not within the province of the courts to rewrite the Act for the purpose of correcting mistakes or supplying omissions. That is a legislative function. As was well said by this court in *Crooks v. Harrelson*, 282 U. S. 55, at page 60, in construing the federal succession tax law:

“Courts have sometimes exercised a high degree of

² State Board of Equalization v. Young's Market, 299 U. S. 59.

ingenuity in the effort to find justification for wrenching from the words of the statute a meaning which literally they did not bear in order to escape consequences thought to be absurd or to entail great hardship. But an application of the principle so nearly approaches the boundary between the exercise of the judicial power and that of the legislative power as to call rather for great caution and circumspection in order to avoid usurpation of the latter. * * * It is not enough merely that hard and objectionable or absurd consequences, which probably were not within the contemplation of the framers, are produced by an act of legislation. Laws enacted with good intention, when put to the test, frequently, and to the surprise of the lawmaker himself, turn out to be mischievous, absurd, or otherwise objectionable. But in such case the remedy lies with the lawmaking authority, and not with the courts."

Cf. *Wallace v. Cutten*, 298 U. S. 229;

Iselin v. United States, 270 U. S. 245;

Palmer v. Massachusetts, 308 U. S. 79.

It would seem obvious that the District Court in adopting such construction of the law was clearly in error.

POINT 3.

The Division of a Natural Class, Bituminous Coal, Into Artificial Classes of Code and Non-Code for Regulatory Purposes Is Unreasonable, Arbitrary, Discriminatory and Capricious, and Therefore Illegal and in Violation of the Fifth Amendment of the Constitution of the United States.

The scheme of classification for regulatory purposes in the Bituminous Coal Act of 1937, is, to say the least, unique. The Act takes a natural class,¹ bituminous coal,

¹ *Heisler v. Thomas Collieries Co.*, 260 U. S. 245.

and divides it into two artificial classes, code and non-code. The regulatory provisions of the act are then expressly made applicable to code members only. The declared purpose of the Bituminous Coal Act of 1937 is to regulate the sale and distribution in interstate commerce of bituminous coal, and it seems to be generally agreed that the purpose of the Act was to stabilize the bituminous coal industry. This court has repeatedly held that classification, in order to be valid, must be based on proper and justifiable distinctions, considering the purpose of the law,² and must not be unreasonable, arbitrary or capricious, and the means selected must have a real and substantial relation to the object sought to be obtained.³ It is very clear from the provisions of section 5 (a) of the Act that membership in the code is, at least ostensibly, voluntary; there is no provision in the regulatory sections of the Act requiring a producer to accept the code, nor is there any provision in any wise prohibiting or limiting the production and sale in interstate commerce of bituminous coal by either code or non-code members. The Act nowhere in its provisions purports to regulate all bituminous coal produced and sold in interstate commerce. It would seem clear that the regulation of a part or portion only of the bituminous coal produced and sold in interstate commerce in the United States would have no real and substantial relation to the stabilization of the bituminous coal industry. If evils exist which require regulation of the bituminous coal produced and sold in interstate commerce, then, in order to remedy the existing evils, all bituminous coal produced and sold in interstate commerce should be regulated.

² *L. & N. Railroad Co. v. Melton*, 218 U. S. 36.

New York Rapid Transit Corp. v. New York, 303 U. S. 573.

³ *Nebbia v. New York*, 291 U. S. 502-525.

The So-Called 19½ Per Cent Tax on the Sale Price of Coal Is Obviously Not a Tax, But a Confiscatory Penalty Assessed Without Fault on the Part of the Appellant. Exemption From Such So-Called Tax Is Based Not Upon Difference in Their Conduct or Product, But Solely Upon Membership in the Code. Such Classification for Exemption Purposes Is Clearly Unreasonable, Arbitrary, Discriminatory and Capricious, and Not in Any Wise a Proper Method of Accomplishing a Proper Congressional Practice, and Violates the Fifth Amendment of the Constitution of the United States. Membership or Nonmembership in an Organization Certainly Cannot Be a Proper Basis for Classification Either for Regulation or Taxation Purposes.

Trial Court held that the so-called excise tax of 19½ per cent of the sale price was a valid exaction from Appellant, since the regulatory provisions of the Act are valid. Thus construed, the so-called excise tax is clearly not a true tax levied under the taxing power of Congress delegated by Article I, section 8, clause 1, of the Constitution of the United States. This Court in the case of *Carter v. Carter Coal Company*, 298 U. S. 238, at page 289, speaking of a similar excise tax levied by the Bituminous Coal Conservation Act of 1935, said:

“It is very clear that the ‘excise tax’ is not imposed for revenue; but exacted as a penalty to compel compliance with the regulatory provisions of the Act. The whole purpose of the exaction is to coerce what is called an agreement—which, of course, it is not, for it lacks the essential element of consent. One who does a thing in order to avoid a monetary penalty does not agree; he yields to compulsion precisely the same as though he did so to avoid a term in jail.”

It seems that this is determinative of the nature of the so-called excise tax.

The exaction cannot be sustained as a penalty. The word "penalty" carries with it the idea of punishment. Punishment without fault would be contrary to natural justice.¹ It may be conceded that Congress has a wide discretion in the imposition of penalties for the violation of its rules, but in order to sustain a penalty there must be some violation of some rule or law. Appellant, it is true, has not accepted the Code, but Congress did not see fit to make the acceptance of the Code obligatory. Nothing contained in the regulatory provisions of the Act would indicate any intention on the part of Congress to in any manner penalize a producer for not accepting the provisions of the code. Ostensibly, at least, membership in the Code is purely voluntary [Section 5 (a)]. Appellant is engaged in the pursuit of a lawful business, has not violated any rule or law, or regulation of Congress. Courts are concerned with the enforcement of legal rights, not moral obligations.

Section 3 (b) of the Act of 1937, imposing the so-called tax of 19½ per cent of the sale price is substantially different from the taxing section of the 1935 Coal Act. Exemption from the so-called excise tax under the 1935 Act was based upon membership in the Code **and compliance with the provisions of such Code**. Exemption under the 1937 Act is based solely upon membership in the Code. This latter classification is clearly unreasonable, arbitrary, capricious and discriminatory. It is rather difficult to conceive how membership, and membership alone, could have any real and substantial relation to the object sought to be attained. Membership in the Code is not the equivalent of a compliance with the regulations. A producer who has accepted the Code, so long as he is a Code member, may violate all minimum and maximum prices and rules and regulations fixed by the Commission and still be im-

¹ Arizona Copper Co. v. Hammer, 250 U. S. 400.

mune from the exaction of any penalty. He may, in time, be expelled from the Code or ordered to cease and desist, as provided in section 5 (h) of the Act, but no penalty attaches by reason of his violation of the prices, rules or regulations. After expulsion he may continue to produce and sell bituminous coal in interstate commerce. He may quit the business. In the event that he desires to be reinstated as a Code member he is subjected to a money payment before membership in the Code is restored. The arbitrary and unreasonable nature of this attempted classification is strikingly illustrated by the present case. While minimum prices were in effect for a short time from December 9, 1937, to February 25, 1938, at all other times since this Act went into effect Appellant and all other producers of coal of any kind or character whatsoever have produced and sold their coal under the same conditions and in an open market in free and open competition one with the other. No minimum or maximum prices, no marketing rules or regulations have been in effect as to either code members or noncode members, and yet, solely because Appellant has not accepted the Code, Appellee is attempting to subject the Appellant to this so-called excise tax of 19½ per cent of the sale price of coal.

The discriminatory nature of such a classification is easily demonstrated. Noncode member may be willing to and may comply with all of the requirements of the Code as to minimum and maximum prices, marketing rules and trade practices, and yet, solely because of his nonmembership in the Code, be subjected to the so-called tax of 19½ per cent. Certainly this is neither reasonable nor permissible classification. Appellee will doubtless contend that this so-called excise tax is a part of the regulatory scheme intended to be sufficiently burdensome to necessitate all producers joining the Code. Whatever the intent may be, it must be conceded that such has not been the effect of the so-called excise tax.

Congress Has No Power to Fix Minimum Prices for Bituminous Coal Sold in Interstate Commerce.

The power to fix prices of bituminous coal in interstate commerce is based upon the grant of power to regulate commerce among the several states. This court heretofore, on numerous occasions,¹ has considered very similar questions, and, whatever may have been the rule prior to March 5, 1934, this Court on that date, in the case of *Nebbia v. New York*, 291 U. S. 502, at page 536, laid down the present governing rule in the following language:

“It is clear that there is no closed class or category of business affected with the public interest, and the functions of courts in the application of the Fifth and Fourteenth Amendments is to determine in each case whether circumstances vindicate the challenged regulation as a reasonable exertion of governmental authority or condemn it as arbitrary or discriminatory. . . . The phrase ‘Affected with the public interest’ can, in the nature of things, mean no more than that an industry, for adequate reason, is subject to control for the public good. In several of the decisions of this court, wherein the expressions ‘Affected with the public interest’ and ‘clothed with public use’ have been brought forward as the criteria of the validity of price control, it has been admitted that they are not susceptible of definition and form an unsatisfactory test of the constitutionality of legislation directed at business practices or prices. These decisions must rest, finally, upon the basis that the requirements of due process were not met because the laws were found arbitrary in their operation and effect. But there can be no doubt that upon proper occasion and by appropriate measures the State may regulate a business in any of its aspects, including the prices to be charged for the product or commodities it sells.”

¹ See dissenting opinion, *Nebbia v. New York*, 291 U. S. 502.

In the *Nebbia* case, *supra*, the question involved was the power of the State to fix milk prices. This Court, in the case of *United States v. Rock Royal Cooperative*, 307 U. S. 533 (decided June 5, 1939), held that "Authority of the Federal Government over interstate commerce does not differ in extent or character from that retained by the states over intrastate commerce." It would seem clear that there is no doubt as to the propriety of this court inquiring into whether or not the occasion was proper and the measures appropriate. The present inquiry is whether or not the Bituminous Coal Act is a reasonable exertion of governmental authority and whether or not it is arbitrary or discriminatory. The cases of *Nebbia v. New York* and *United States v. Rock Royal Cooperative*, *supra*, both involve the question of fixing milk prices in the State of New York, and it is clear, from a reading of these cases, that the price control features of the Act were sustained upon the theory that the use and nature of milk was such as to create an interest of the public in the source and the continuity of an uncontaminated supply of a necessary article of food sufficient to justify its regulation for the public good. Coal is entirely unlike milk, both in its nature and its use. Nature created the source of supply and its existence does not depend upon any activity of man. Its nature and use is such that it could in nowise endanger the health or morals of the populace. Various states have enacted legislation to promote safety in the mining of coal, but this legislation is directed at the manner of production and not because of any danger inherent in the product. No question of conservation is here involved, as the court in its findings of fact made no finding that this natural resource is being wasted. As a matter of fact, the Court specifically refused to make a finding that "The operators wasted the best of the nation's coal reserve because they were cheap and readily

available" (Statement as to jurisdiction, page 56). The Court found in its findings of fact that "Due largely to over-expansion of the industry during the world war, to competition from other fuels and to increased efficiency in the use of fuel, the amount of soft coal consumed has markedly declined (R. 1, pp. 47-48). (See also *United States v. Appalachian Coals, Inc.*, 288 U. S. 344, 53 Sup. Ct. 471.)

In the case of *City of Atlanta v. National Bituminous Coal Commission*, 26 Fed. Supp., page 606 (decided February 16, 1939, by the District Court of the United States for the District of Columbia), the Court took occasion to make the following remark:

"The soft coal industry supplies the nation with its primary source of energy, vitally essential to the existence of the country's industries, and to the health and comfort of its inhabitants. Conditions in the marketing of coal have long been more or less chaotic, with the result that the flow of commerce in coal has been seriously burdened and impaired. It was to eradicate this evil, and to prevent its recurrence, that Congress acted thus to protect interstate commerce."

Clearly the ills of the coal industry are directly attributable to overproduction. Consumption is annual, being lessened by improved methods of burning and by competition with other sources of energy. It is a matter of common knowledge that coal has maintained its ascendancy as a source of energy largely by reason of its economy. It is also commonly known that the result of the present fixing of prices in the bituminous coal industry will lead to a substantial increase in the cost of coal to practically every consumer of bituminous coal. The natural and logical result of narrowing the differential between bituminous coal and competing sources of energy can but be the further loss of markets, with a corresponding further reduc-

tion in the consumer demand and a corresponding increase in the afflictions which beset the industry by reason of this overproduction. It can scarcely be contended that an increase in the price of bituminous coal would in anywise encourage an increased consumption, stop the encroachment of other sources of energy upon the coal markets, nor prevent labor disturbances. The most that is claimed for the Act by its administrators is that it will save the coal industry from bankruptcy and give an opportunity to producers and miners alike to avoid poverty and to wear shoes on their feet. Whatever may have been the purpose of the Act, it stands revealed that the effect of the Act is to permit those operators who belong to the Code to combine and increase the cost of bituminous coal to the consuming public without the wholesome restriction of the Anti-trust laws of the United States [April 26, 1937, c. 127, sec. 4, part 1, 50 Stat. 76, 15 U. S. C. A. 832 (d), Bituminous Coal Act, section 4 (d)]. This can hardly be considered a regulation of commerce within the power of Congress to foster, protect and encourage. If reasonableness can be found under these circumstances, it can be found almost anywhere. If financial difficulties of part of the industry, keen and active competition, labor troubles, be considered proper circumstances sufficient to justify regulation of industry by Congress, then, indeed, have the experiences of the last few years furnished a background for the federal regulation of practically every industrial activity within the United States. Surely it was not the intention of the framers of the Constitution to delegate to Congress the power to regulate all industry to the end that everybody engaged in industrial activity might be protected from financial difficulties, open competition, and be assured that their business might be operated at a profit.

It is undoubtedly the general rule that property rights and contract rights shall be free from governmental inter-

ference. It is very clear that the so-called 19½ per cent tax has no connection with the revenues of the government, but that its sole purpose is to coerce producers into acceptance of the Code. This Congress cannot do (*Charles C. Steward Machine Co. v. Davis*, 301 U. S. 548; *Carmichael v. Southern Coal & Coke Co.*, 301 U. S. 495).

If the Act be construed as the lower court has construed it, it is violative of the due-process-of-law clause of the Fifth Amendment and in violation of the inherent rights of the citizen. Briefly, the method of regulation is to set up an artificial entity designated as "The Code," provide for voluntary membership in the Code, and regulate those producers who accept the Code, and coerce, by means of the 19½ per cent tax, other producers of the same class, who do not accept the Code, into either joining the Code or quitting business. Coercion and intimidation are not permitted by the courts as between private citizens; much less should it be permitted as between the government and its citizens. What has heretofore been said as to the arbitrary and discriminatory nature of the various provisions of the Act is applicable here. If Congress should have the power to regulate the bituminous coal industry, this end must be attained by laws not violative of the Fifth Amendment. Regulation, to be effective, must regulate all of the class, and it is very clear that this is not done in the Bituminous Coal Act of 1937. The Bituminous Coal Act of 1937, therefore, is clearly beyond the power of Congress for the reason that it is not reasonable governmental regulation designed to foster, protect or encourage interstate commerce, and is arbitrary and discriminatory.

Mulford v. Smith, 307 U. S. 38.

Undoubtedly, Appellee will rely on the above case as determinative of the questions here presented. This case

presented constitutional questions with reference to the Agricultural Adjustment Act in its application to Flue-Cured Tobacco. There are fundamental differences between the Agricultural Adjustment Act and the Bituminous Coal Act of 1937 both in their method of regulation and the administrative provisions. Congress in the enactment of the Agricultural Adjustment Act of 1938 found that the marketing of tobacco was a basic industry which directly affects interstate and foreign commerce; that stable conditions in such marketing are necessary to the general welfare; that tobacco is sold on a national market and it and its products move almost wholly in interstate and foreign commerce; that without federal assistance the farmers are unable to bring about orderly marketing, with a consequence that abnormally excessive supplies are produced and dumped indiscriminately on the national market; that this disorderly marketing of excess supply burdens and obstructs interstate and foreign commerce, causes reduction in prices and consequent injury to commerce, creates disparity between the prices of tobacco in interstate and foreign commerce and the prices of industrial products in such commerce, and diminishes the volume of interstate commerce in industrial products, and that the establishment of quotas as provided by the Act is necessary and appropriate to promote, foster and obtain an orderly flow of tobacco in interstate and foreign commerce. Congress thus recognizes that the ills of the tobacco industry are attributable to overproduction, and attacks the evil by a method reasonably designed, if not to curtail production, to diminish the supply that moves on the interstate and foreign market. It does not fix prices, but fixes quotas which the producer may sell through the available marketing agencies, and penalizes those who exceed their marketing quotas. After regulation has been adopted by vote, regulation is applicable to all producers of flue-cured tobacco. Here we have a regu-

lation of all of the class without discrimination; the control of the sales by the authoritative fixing of marketing quotas; a penalty for a violation of the marketing quota, which is a far different method of regulation from that prescribed by the Bituminous Coal Act of 1937. The Bituminous Coal Act of 1937 does not purport to regulate all of the class of bituminous coal, but only that part of the class who have accepted the code. It does not purport to control or curtail the sales of bituminous coal in interstate commerce; permits all the coal produced by code and non-code members to be sold in interstate commerce; fixes minimum prices and marketing rules and regulations for code members and code members only; does not prohibit the production and sale of bituminous coal in interstate commerce by non-code producers; and, as construed by the court below, attempts to place a so-called tax of $19\frac{1}{2}$ per cent of the sale price upon that part of the bituminous coal sold in interstate commerce by the non-code producer. This presents an entirely different situation and different questions from those presented in the case of *Mulford v. Smith*, supra. The cases are in no wise analogous.

Right to Equitable Relief.

Findings of the Court disclose that Appellant's property had been operated at a loss for the past three years; that the total sale value of defendant's property would not exceed \$30,000.00; that Appellant could not borrow money (R. 1, p. 45); the burdensome and confiscatory nature of the $19\frac{1}{2}$ per cent tax is obvious; the inability of Appellant to pay the tax is equally obvious. If Appellant was required to pay this exorbitant and excessive so-called excise tax the resultant confiscation of its property is very clear; the good faith and diligent prosecution of its claim is apparent, and was declared in the Court's opinion (Jurisdictional statement, page 58). The facts bring Appellant

clearly within the doctrine of this court laid down in *Ex parte Young*, 209 U. S. 123, and equitable protection of Appellant should be extended by this Court until the final termination of this litigation (*Natural Gas Pipe Line Co. v. Slattery*, 302 U. S. 300; *Carter v. Carter Coal Co.*, 298 U. S. 238 [dissenting opinion, Cardozo, J.]. See, also, *Miller v. Standard Nut Margarine Co.*, 284 U. S. 498; *Hill v. Wallace*, 259 U. S. 44-62).

CONCLUSION.

It is respectfully submitted that so much of the decree herein as dismisses the complaint of Appellant be reversed and cause remanded to the court below with directions to grant relief as prayed in the complaint, or for further proceedings herein.

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APPENDIX.

[Public—No. 48—75th Congress]

[Chapter 127—1st Session]

[H. R. 4985]

An Act

**To Regulate Interstate Commerce in Bituminous Coal,
and for Other Purposes.**

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That regulation of the sale and distribution in interstate commerce of bituminous coal is imperative for the protection of such commerce; that there exist practices and methods of distribution and marketing of such coal that waste the coal resources of the Nation and disorganize, burden, and obstruct interstate commerce in bituminous coal, with the result that regulation of the prices thereof and of unfair methods of competition therein is necessary to promote interstate commerce in bituminous coal and to remove burdens and obstructions therefrom.

National Bituminous Coal Commission

Sec. 2. (a) There is hereby established in the Department of the Interior a National Bituminous Coal Commission (herein referred to as Commission), which shall be composed of seven members appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The Commission shall annually designate its chairman, and shall have a seal which shall be judicially recognized. Any person appointed to fill a vacancy shall be appointed only for the unexpired term of his predecessor in office. The Commission shall have an office in the city

of Washington, District of Columbia, and shall convene at such times and places as the majority of the Commission shall determine. Two members of the Commission shall have been experienced bituminous coal mine workers, two shall have had previous experience as producers, but none of the members shall have any financial interest, direct or indirect, in the mining, transportation, or sale of, or manufacture of equipment for, coal (whether or not bituminous coal), oil, or gas, or in the generation, transmission, or sale of hydro-electric power, or in the manufacture of equipment for the use thereof, and shall not actively engage in any other business, vocation, or employment. Not more than one commissioner shall be a resident of any one State, and not more than one commissioner shall be a resident of any one of the districts hereinafter established, but a change in any of the boundaries of the districts, made by the Commission as hereinafter provided, shall not affect the tenure of office of any commissioner then serving. Any commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office. The Commission is authorized to appoint and fix the compensation and duties of a secretary and necessary professional, clerical, and other assistants. With the exception of the secretary, a clerk to each commissioner, the attorneys, the managers and employees of the statistical bureaus hereinafter provided for, and such special agents, technical experts, and examiners as the Commission may require, all employees of the Commission shall be appointed and their compensation fixed in accordance with the provisions of the civil-service laws and the Classification Act of 1923, as amended. No person appointed without regard to the provisions of the civil-service laws shall be related to any member of the Commission by marriage or within the third degree by blood. The Commission is authorized to accept and utilize voluntary and uncompensated services of any person or of

any official of a State or political subdivision thereof. The members of the Commission shall each receive compensation at the rate of \$10,000 per year and necessary traveling expenses. Such Commission shall have the power to make and promulgate all reasonable rules and regulations for carrying out the provisions of this Act and shall annually make full report of its activities to the Secretary of the Interior for transmission to Congress. A majority of the Commission shall constitute a quorum for the transaction of business, and a vacancy in the Commission shall not impair the right of the remaining members to exercise all the power of the Commission. No order which is subject to judicial review under section 6, and no rule or regulation which has the force and effect of law, shall be made or prescribed by the Commission, unless it has given reasonable public notice of a hearing, and unless it has afforded to interested parties an opportunity to be heard, and unless it has made findings of fact. Such findings, if supported by substantial evidence shall be conclusive upon review thereof by any court of the United States. The Commission may establish divisions, each of which divisions shall consist of not less than three of its members, as it may deem necessary for the proper dispatch of its business. Each such division shall exercise all the powers and authority of the Commission in the premises: Provided, That any person in interest may, upon written petition, secure a review by the Commission of the report, finding, or order of such division. The Commission may by its order assign or refer any matter within its jurisdiction under this Act to an individual Commissioner, to a board composed of employees of the Commission, or to an examiner, to be designated by such order, for hearing and the recommendation of an appropriate order in the premises. Each individual Commissioner, board, or examiner, when so directed by order of the Commission, shall have power to administer

oaths and affirmations, to examine witnesses, and receive evidence. The Commission is authorized to make contracts for personal services in the District of Columbia and elsewhere and to establish and maintain such offices throughout the United States as it deems necessary for the effective administration of this Act, but shall maintain its principal office in the District of Columbia.

The Commission is hereby authorized to initiate, promote, and conduct research designed to improve standards and methods used in the mining, preparation, conservation, distribution, and utilization of coal and the discovery of additional uses for coal, and for such purposes shall have authority to assist educational, governmental, and other research institutions in conducting research in coal, and to do such other acts and things as it deems necessary and proper to promote the use of coal and its derivatives.

(b) (1) There is hereby established an office in the Department of the Interior to be known as the office of the consumers' counsel of the National Bituminous Coal Commission. The office shall be in charge of a counsel to be appointed by the President, by and with the advice and consent of the Senate. The counsel shall have no financial interest, direct or indirect, in the mining, transportation, or sale of, or the manufacture of equipment for, coal (whether or not bituminous coal), oil, or gas, or in the generation, transmission, or sale of hydroelectric power, or in the manufacture of equipment for the use thereof, and shall not actively engage in any other business, vocation, or employment. The counsel shall receive compensation, at the rate of \$10,000 per year and necessary traveling expenses.

(2) It shall be the duty of the counsel to appear in the interest of the consuming public in any proceeding before the Commission and to conduct such independent investigation of matters relative to the coal industry and the

administration of this Act as he may deem necessary to enable him properly to represent the consuming public in any proceeding before the Commission. In any such proceeding before the Commission, the counsel shall have the right to offer any relevant testimony and argument, oral or written, and to examine and cross-examine witnesses and parties to the proceeding, and shall have the right to have subpoena or other process of the Commission issue in his behalf. Whenever the counsel finds that it is in the interest of the consuming public to have the Commission furnish any information at its command or conduct any investigation as to any matter within its authority, the counsel shall so certify to the Commission, specifying in the certificate the information or investigation desired. Thereupon the Commission shall promptly furnish to the counsel the information or promptly conduct the investigation and place the results thereof at the disposal of the counsel.

(3) The counsel is authorized to appoint and fix the compensation and duties of necessary professional, clerical, and other assistants. With the exception of a clerk to the counsel, the attorneys, and such special agents and experts as the counsel may from time to time find necessary for the conduct of his work, all employees of the counsel shall be appointed and their compensation fixed in accordance with the civil-service laws and the Classification Act of 1923, as amended. The counsel is authorized to make such expenditures as may be necessary for the performance of the duties vested in him.

(4) The counsel shall annually make a full report of the activities of his office directly to the Congress.

Tax on Coal

Sec. 3. (a) There is hereby imposed upon the sale or other disposal of bituminous coal produced within the United

States when sold or otherwise disposed of by the producer thereof an excise tax of 1 cent per ton of two thousand pounds.

The term "disposal" as used in this section includes consumption or use (whether in the production of coke or fuel, or otherwise) by a producer, and any transfer of title by the producer other than by sale.

(b) In addition to the tax imposed by subsection (a) of this section, there is hereby imposed upon the sale or other disposal of bituminous coal produced within the United States, when sold or otherwise disposed of by the producer thereof, which would be subject to the application of the conditions and provisions of the code provided for in section 4, or of the provisions of section 4-A, an excise tax in an amount equal to $19\frac{1}{2}$ per centum of the sale price at the mine in the case of coal disposed of by sale at the mine, or in the case of coal disposed of otherwise than by sale at the mine, and coal sold otherwise than through an arms' length transaction, $19\frac{1}{2}$ per centum of the fair market value of such coal at the time of such disposal or sale. In the case of any producer who is a code member as provided in section 4 and is so certified to the Commissioner of Internal Revenue by the Commission, the sale or disposal by such producer during the continuance of his membership in the code of coal produced by him shall be exempt from the tax imposed by this subsection.

(c) The taxes imposed by this section shall be paid to the United States by the producer, and shall be payable monthly for each calendar month on or before the first business day of the second succeeding month, under such regulations and in such manner as shall be prescribed by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury.

(d) In the case of coal disposed of otherwise than by sale

at the mine, and coal sold otherwise than through an arms' length transaction, the Commissioner of Internal Revenue shall determine the market value thereof. Such market value shall equal the current market price at the mine of coal of a comparable kind, quality, and size produced for market in the locality where the coal so disposed of is produced.

(e) The tax imposed by subsection (a) of this section shall not apply in the case of a sale of coal for the exclusive use of the United States or of any State or Territory of the United States or the District of Columbia, or any political subdivision of any of them, for use in the performance of governmental functions. Under regulations prescribed by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury, a credit against the tax imposed by subsection (a) of this section or a refund may be allowed or made to any producer of coal in the amount of such tax paid with respect to the sale of coal to any vendee, if the producer has in his possession such evidence as the regulations may prescribe that such coal was resold by any person for the exclusive use of the United States or of any State, Territory of the United States, or the District of Columbia, or any political subdivision of any of them, for use in the performance of governmental functions.

(f) No producer shall, by reason of his acceptance of the code provided for in section 4, or of the exemption from the tax provided in subsection (b) in this section, be held to be precluded or estopped from contesting the constitutionality of any provision of this Act or of the code, or the validity or application of either to him or to any part of the coal produced by him.

Bituminous Coal Code

Sec. 4. The provisions of this section shall be promulgated by the Commission as the "Bituminous Coal Code", and are herein referred to as the code.

Producers accepting membership in the code as provided in section 5 (a) shall be, and are herein referred to as, code members, and the provisions of such code shall apply only to such code members, except as otherwise provided by subsection (h) of part II of this section.

For the purpose of carrying out the declared policy of this Act, the code shall contain the following conditions and provisions, which are intended to regulate interstate commerce in bituminous coal and which shall be applicable only to matters and transactions in or directly affecting interstate commerce in bituminous coal:

Part I--Organization

(a) Twenty-three district boards of code members shall be organized. Each district board shall consist of not less than three nor more than seventeen members. The number of members of the district board shall, subject to the approval of the Commission, be determined by the majority vote of the district tonnage during the calendar year 1936 represented at a meeting of the code members of the district called for the purpose of such determination and for the election of such district board; and all code members within the district shall be given notice of the time and place of the meeting. All but one of the members of the district board shall be code members or representatives of code members truly representative of all the mines of the district. The number of such producer members shall be an even number. One-half of such producer members shall be elected by the majority in number of the code members of the district represented at the aforesaid meeting. The other producer members shall be elected by votes cast in

the proportion of the annual tonnage output of the code members in the district, for the calendar year preceding the date of the election: Provided, That not more than one officer or employee of any code member within a district shall be a member of the district board at the same time. The remaining member of each district board shall be selected by the organization of employees representing the preponderant number of employees in the industry of the district in question. The term of district board members shall be two years and until their successors are elected. The Commission shall have power to remove any member of any district board upon its finding, after due notice and hearing, that said member is guilty of inefficiency, willful neglect of duty, or malfeasance in office.

The district boards shall have power to adopt bylaws and rules of procedure, subject to approval of the Commission, and to appoint officers from within or without their own membership, to fix their terms and compensation, to provide for reports, and to employ such committees, employees, arbitrators, and other persons necessary to effectuate their purposes. Members of the district board shall serve, as such, without compensation but may be reimbursed for their reasonable expenses. The territorial boundaries or limits of the twenty-three districts are set forth in the schedule entitled "Schedule of Districts" and annexed to this Act.

Whenever the Commission upon investigation instituted upon its own motion or upon petition of any code member, district board, State or political subdivision thereof, or the consumers' counsel, after hearing finds that the territorial boundaries or limits of any district or minimum-price area are such as to make it substantially impracticable to establish minimum prices in accordance with all the standards set forth in subsections (a) and (b) of part II of this section, and that a change in such territorial boundaries or

limits or a division or consolidation of such districts or minimum-price areas would render the establishment of minimum prices in accordance with all such standards more practicable, it shall by order make such changes, divisions, and consolidations as it finds will substantially aid in such establishment of minimum prices.

(b) The expense of administering the code by the respective district boards shall be borne by the code members in the respective districts, each paying his proportionate share, as assessed, computed on a tonnage basis, in accordance with regulations prescribed by such boards with the approval of the Commission. Such assessments may be collected by the district board by action in any court of competent jurisdiction.

(c) Nothing contained in this Act shall constitute the members of a district board partners for any purpose. Nor shall any member of a district board or officer thereof be liable in any manner to anyone for any act of any other member, officer, agent, or employee of the district board. Nor shall any member or officer of a district board, exercising reasonable diligence in the conduct of his duties under this Act, be liable to anyone for any action or omission to act under this Act except for his own willful misfeasance or for nonfeasance involving moral turpitude.

(d) No action complying with the provisions of this section taken while this Act is in effect or within sixty days thereafter, by any code member or by any district board, or officer thereof, shall be construed to be within the prohibitions of the antitrust laws of the United States.

Part II—Marketing

The Commission shall have power to prescribe for code members minimum and maximum prices, and marketing rules and regulations, as follows:

(a) All code members shall report all spot orders to such statistical bureau hereinafter provided for as may be designated by the Commission and shall file with it copies of all contracts for the sale of coal, copies of all invoices, copies of all credit memoranda, and such other information concerning the preparation, cost, sale, and distribution of coal as the Commission may authorize or require. All such records shall be held by the statistical bureau as the confidential records of the code member filing such information.

For each district there shall be established by the Commission a statistical bureau which shall be operated and maintained as an agency of the Commission. Each statistical bureau shall be under the direction of a manager, who shall be appointed by the Commission. No producer, employee, or representative of a producer, and, except as the Commission may specifically approve, no member of a district board or employee or representative thereof shall be an employee of any statistical bureau.

Each district board shall, from time to time on its own motion or when directed by the Commission, propose minimum prices free on board transportation facilities at the mines for kinds, qualities, and sizes of coal produced in said district, and classification of coal and price variations as to mines; consuming market areas, values as to uses and seasonal demand. Said prices shall be proposed so as to yield a return per net ton for each district in a minimum price area, as such districts are identified and such area is defined in the subjoined table designated "minimum-price-area table", equal as nearly as may be to the weighted average of the total costs, per net ton, determined as hereinafter provided, of the tonnage of such minimum price area. The computation of the total costs shall include the cost of labor, supplies, power, taxes, insurance, workmen's compensation, royalties, depreciation and depletion (as de-

terminated by the Bureau of Internal Revenue in the computation of the Federal income tax) and all other direct expenses of production, coal operators' association dues, district board assessments for Board operating expenses only levied under the code, and reasonable costs of selling and the cost of administration.

Minimum-Price-Area Table

Area 1: Eastern Pennsylvania, district 1; western Pennsylvania, district 2; northern West Virginia, district 3; Ohio, district 4; Michigan, district 5; Panhandle, district 6; Southern numbered 1, district 7; Southern numbered 2, district 8; that part of Southeastern district 13, comprising Van Buren, Warren, and McMinn Counties in Tennessee.

Area 2: West Kentucky, district 9; Illinois, district 10; Indiana, district 11; Iowa, district 12.

Area 3: Southeastern, district 13, except Van Buren, Warren, and McMinn Counties in Tennessee.

Area 4: Arkansas-Oklahoma, district 14.

Area 5: Southwestern, district 15.

Area 6: Northern Colorado, district 16; southern Colorado, district 17; New Mexico, district 18.

—Area 7: Wyoming, district 19; Utah, district 20.

Area 8: North Dakota and South Dakota, district 21.

Area 9: Montana, district 22.

Area 10: Washington and Alaska, district 23.

The minimum prices so proposed shall reflect, as nearly as possible, the relative market value of the various kinds, qualities, and sizes of coal, shall be just and equitable as between producers within the district, and shall have due regard to the interests of the consuming public. The procedure for proposal of minimum prices shall be in accord-

ance with rules and regulations to be approved by the Commission.

A schedule of such proposed minimum prices, together with the data upon which they are computed, including, but without limitation, the factors considered in determining the price relationship, shall be submitted by the district board to the Commission, which may approve, disapprove, or modify such proposed minimum prices to conform to the requirements of this subsection, which shall serve as the basis for the coordination provided for in the succeeding subsection (b): Provided, That all minimum prices proposed for any kind, quality, or size of coal for shipment into any consuming market area shall be just and equitable as between producers within the district: And provided further, That no minimum price shall be proposed that permits dumping.

As soon as possible after its creation, each district board shall determine, from cost data submitted by the proper statistical bureau of the Commission, the weighted average of the total costs of the ascertainable tonnage produced in the district in the calendar year 1936. The district board shall adjust the average costs so determined, as may be necessary to give effect to any changes in wage rates, hours of employment, or other factors substantially affecting costs, exclusive of seasonal changes, so as to reflect as accurately as possible any change or changes which may have been established since January 1, 1936. Such determination and the computations upon which it is based shall be promptly submitted to the Commission by each district board in the respective minimum-price area. The Commission shall thereupon determine the weighted average of the total costs of the tonnage for each minimum-price area in the calendar year 1936, adjusted as aforesaid, and transmit it to all the district boards within such minimum-price area. Said weighted average of the total costs shall be

taken as the basis, to be effective until changed by the Commission, for the proposal and establishment of minimum prices. Thereafter, upon satisfactory proof made at any time by any district board of a change in excess of 2 cents per net ton of two thousand pounds in the weighted average of the total costs in the minimum price area, exclusive of seasonal changes, the Commission shall increase or decrease the minimum prices accordingly. The weighted average figures of total cost determined as aforesaid shall be available to the public.

Each district board shall, on its own motion or when directed by the Commission, propose reasonable rules and regulations incidental to the sale and distribution, by code members within the district, of coal. Such rules and regulations shall not be inconsistent with the requirements of this section and shall conform to the standards of fair competition hereinafter established. Such rules and regulations shall be submitted by the district board to the Commission with a statement of the reasons therefor, and the Commission may approve, disapprove, or modify the same, for the purpose of coordination.

(b) District boards shall, under rules and regulations established by the Commission, coordinate in common consuming market areas upon a fair competitive basis the minimum prices and the rules and regulations proposed by them, respectively, under subsection (a) hereof. Such coordination, among other factors, but without limitation, shall take into account the various kinds, qualities, and sizes of coal, and transportation charges upon coal. All minimum prices proposed for any kind, quality, or size of coal for shipment into any common consuming market area shall be just and equitable, and not unduly prejudicial or preferential, as between and among districts, shall reflect, as nearly as possible, the relative market values, at points of delivery in each common consuming market area, of the

various kinds, qualities, and sizes of coal produced in the various districts, taking into account values as to uses, seasonal demand, transportation methods and charges and their effect upon a reasonable opportunity to compete on a fair basis, and the competitive relationships between coal and other forms of fuel and energy; and shall preserve as nearly as may be existing fair competitive opportunities. The minimum prices proposed as a result of such coordination shall not, as to any district, reduce or increase the return per net ton upon all the coal produced therein below or above the minimum return as provided in subsection (a) of this section by an amount greater than necessary to accomplish such coordination, to the end that the return per net ton upon the entire tonnage of the minimum price area shall approximate the weighted average of the total cost per net ton of the tonnage of such minimum price area. Such coordinated prices and rules and regulations, together with the data upon which they are predicated, shall be submitted to the Commission. The Commission shall thereupon establish, and from time to time, upon complaint or upon its own motion, review and revise the effective minimum prices and rules and regulations in accordance with the standards set forth in subsections (a) and (b) of part II of this section.

(c) When, in the public interest, the Commission deems it necessary to establish maximum prices for coal in order to protect the consumer of coal against unreasonably high prices therefor, the Commission shall have the power to establish maximum prices free on board transportation facilities for coal in any district. Such maximum prices shall be established at a uniform increase above the minimum prices in effect within the district at the time, so that in the aggregate the maximum prices shall yield a reasonable return above the weighted average total cost of the district: Provided, That no maximum price shall be estab-

lished for any mine which shall not yield a fair return on the fair value of the property.

(d) If any code member or district board or member thereof, or any State or political subdivision of a State, or the consumers' counsel; shall be dissatisfied with such coordination of prices or rules and regulations, or by a failure to establish such coordination of prices or rules and regulations, or by any minimum or maximum prices established pursuant to subsections (b) or (c) of part II of this section, he or it shall have the right, by petition, to make complaint to the Commission, and the Commission shall, under rules and regulations established by it, and after notice and hearing, make such order as may be required to effectuate the purpose of subsections (b) and (c) of part II of this section. Pending final disposition of such petition, and upon reasonable showing of necessity therefor, the Commission may make such preliminary or temporary order as in its judgment may be appropriate, and not inconsistent with the provisions of this Act.

(e) No coal subject to the provisions of this section shall be sold or delivered or offered for sale at a price below the minimum or above the maximum therefor established by the Commission, and the sale or delivery or offer for sale of coal at a price below such minimum or above such maximum shall constitute a violation of the code: Provided, That the provisions of this paragraph shall not apply to a lawful and bona fide written contract entered into prior to June 16, 1933.

The making of a contract for the sale of coal at a price below the minimum or above the maximum therefor established by the Commission at the time of the making of the contract shall constitute a violation of the code, and such contract shall be invalid and unenforceable.

From and after the date of approval of this Act, until prices shall have been established pursuant to subsections

(a) and (b) of part II of this section, no contract for the sale of coal shall be made providing for delivery for a period longer than thirty days from the date of the contract.

No contract shall be made for the sale of coal for delivery after the expiration date of this Act at a price below the minimum or above the maximum therefor established by the Commission and in effect at the time of making the contract.

The minimum prices established in accordance with the provisions of this section shall not apply to coal sold and shipped outside the domestic market. The domestic market shall include all points within the continental United States and Canada, and car-ferry shipments to the island of Cuba. Bunker coal delivered to steamships for consumption thereon shall be regarded as shipped within the domestic market. Maximum prices established in accordance with the provisions of this section shall not apply to coal sold and shipped outside the continental United States.

(f) All data, reports, and other information in the possession of any agency of the United States in relation to coal shall be available to the Commission and to the office of the consumers' counsel for the administration of this Act.

(g) The price provisions of this Act shall not be evaded or violated by or through the use of docks or other storage facilities or transportation facilities, or by or through the use of subsidiaries, affiliated sales or transportation companies or other intermediaries or instrumentalities, or by or through the absorption, directly or indirectly, of any transportation or incidental charge of whatsoever kind or character, or any part thereof. The Commission is hereby authorized, after investigation and hearing, and upon notice to the interested parties, to make and issue rules and regulations to make this subsection effective.

(h) The Commission shall, by order, prescribe due and reasonable maximum discounts or price allowances that may be made by code members to persons (whether or not code members), herein referred to as "distributors", who purchase coal for resale and resell it in not less than cargo or railroad carload lots; and shall require the maintenance and observance by such persons, in the resale of such coal, of the prices and marketing rules and regulations established under this section.

Unfair Methods of Competition

(i) The following practices with respect to coal shall be unfair methods of competition and shall constitute violations of the code:

1. The consignment of unordered coal, or the forwarding of coal which has not actually been sold, consigned to the producer or his agent: Provided, however, That coal which has not actually been sold may be forwarded, consigned to the producer or his agent at rail or track yards, tidewater ports, river ports, or lake ports, or docks beyond such ports, when for application to any of the following classes: Bunker coal, coal applicable against existing contracts, coal for storage (other than in railroad cars) by the producer or his agent, in rail or track yards or on docks, wharves, or other yards for resale by the producer or his agent.

2. The adjustment of claims with purchasers of coal in such manner as to grant secret allowances, secret rebates, or secret concessions, or other price discrimination.

3. The prepayment of freight charges with intent to or having the effect of granting a discriminatory credit allowance.

4. The granting in any form of adjustments, allowances,

discounts, credits, or refunds to purchasers or sellers of coal, for the purposes or with the effect of altering retroactively a price previously agreed upon, in such manner as to create price discrimination.

5. The predating or postdating of any invoice or contract for the purchase or sale of coal, except to conform to a bona-fide agreement for the purchase or sale entered into on the predate.

6. The payment or allowance in any form or by any device of rebates, refunds, credits, or unearned discounts, or the extension to certain purchasers of services or privileges not extended to all purchasers under like terms and conditions, or under similar circumstances.

7. The attempt to purchase business, or to obtain information concerning a competitor's business by concession, gifts, or bribes.

8. The intentional misrepresentation of any analysis or of analyses, or of sizes, or the intentional making, causing, or permitting to be made, or publishing, of any false, untrue, misleading, or deceptive statement by way of advertising, invoicing, or otherwise concerning the size, quality, character, nature, preparation, or origin of any coal bought, sold, or consigned.

9. The unauthorized use, whether in written or oral form, of trade-marks, trade names, slogans, or advertising matter already adopted by a competitor, or any deceptive approximation thereof.

10. Inducing or attempting to induce, by means or device whatsoever, a breach of contract between a competitor and his customer during the term of such contract.

11. Splitting or dividing commissions, brokers' fees, or brokerage discounts, or otherwise in any manner directly or indirectly using brokerage commissions or jobbers' ar-

rangements or sales agencies for making discounts, allowances or rebates, or prices other than those determined under this Act, to any industrial consumer or to any retailers, or to others, whether of a like or different class.

12. Selling to, or through, any broker, jobber, commission account, or sales agency, which is in fact or in effect an agency or an instrumentality of a retailer or an industrial consumer or of an organization of retailers or industrial consumers, whereby they are¹ any of them secure either directly or indirectly a discount, dividend, allowance, or rebates, or a price other than that determined in the manner prescribed by this Act.

13. Employing any person or appointing any sales agent, at a compensation obviously disproportionate to the ordinary value of the service or services rendered, and whose employment or appointment is made with the primary intention and purpose of securing preferment with a purchaser or purchasers of coal.

It shall not be an unfair method of competition or a violation of the code or any requirement of this Act (1) to sell to or through any bona-fide and legitimate farmers' cooperative organization duly organized under the laws of any State, Territory, the District of Columbia, or the United States whether or not such organization grants rebates, discounts, patronage dividends, or other similar benefits to its members; (2) to sell through any intervening agency to ~~any such~~ cooperative organization; or (3) to pay or allow to any such cooperative organization or to any such intervening agency any discount, commission, rebate, or dividend ordinarily paid or allowed, or permitted by the code to be paid or allowed, to other purchasers for purchasers in wholesale or middleman quantities.

¹ So in original.

(j) The Commission shall have jurisdiction to hear and determine written complaints made by any code member, district board, or member thereof, State or political subdivision of a State, or the consumers' counsel; which charge any violation of the code specified in part II of this section. It shall make and publish rules and regulations for the consideration and hearing of any such complaint, and all interested parties shall be required to conform thereto. The Commission shall make due effort toward adjustment of such complaints and shall endeavor to compose the differences of the parties, and shall make such order or orders in the premises, from time to time, as the facts and the circumstances warrant. Any such order shall be subject to review as are other orders of the Commission.

(k) In the investigation of any complaint or violation of the code, or of any rule or regulation the observance of which is required under the terms thereof, the Commission shall have power by order to require such reports from, and shall be given access to inspect the books and records of, code members to the extent deemed necessary for the purpose of determining the complaint. Any such order shall be subject to review as are other orders of the Commission.

(l) The provisions of this section shall not apply to coal consumed by the producer or to coal transported by the producer to himself for consumption by him.

Sec. 4-A. Whenever the Commission upon investigation instituted upon its own motion or upon petition of any code member, district board, State or political subdivision thereof, or the consumers' counsel, after hearing finds that transactions in coal in intrastate commerce by any person or in any locality cause any undue or unreasonable advantage, preference, or prejudice as between persons

and localities in such commerce on the one hand and interstate commerce in coal on the other hand, or any undue, unreasonable, or unjust discrimination against interstate commerce in coal, or in any manner directly affect interstate commerce in coal, the Commission shall by order so declare and thereafter coal sold, delivered or offered for sale in such intrastate commerce shall be subject to the provisions of section 4.

Any producer believing that any commerce in coal is not subject to the provisions of section 4 or to the provisions of the first paragraph of this section may file with the Commission an application, verified by oath or affirmation for exemption, setting forth the facts upon which such claim is based. The filing of such application in good faith shall exempt the applicant, beginning with the third day following the filing of the application, from any obligation, duty, or liability imposed by section 4 with respect to the commerce covered by the application until such time as the Commission shall act upon the application. If the Commission has reason to believe that such exemption during the period prior to action upon the application is likely to permit evasion of the Act with respect to commerce in coal properly subject to the provisions of section 4 of the first paragraph of this section, it may suspend the exemption for a period not to exceed ten days. Within a reasonable time after the receipt of any application for exemption the Commission shall enter an order granting, or, after notice and opportunity for hearing, denying or otherwise disposing of such application. As a condition to the entry of and as a part of any order granting such application, the Commission may require the applicant to apply periodically for renewals of such order and to file such periodic reports as the Commission may find necessary or appropriate to enable it to determine whether the conditions supporting the exemption

continue to exist. Any applicant aggrieved by an order denying or otherwise disposing of an application for exemption by the Commission may obtain a review of such order in the manner provided in subsection (b) of section 6.

Organization of the Code

Sec. 5 (a) Upon the appointment of the Commission it shall at once promulgate said code and assist in the organization of the district boards as provided for in section 4, and shall prepare and supply to all coal producers forms of acceptance for membership therein. Such forms of acceptances, when executed, shall be acknowledged before any official authorized to take acknowledgments.

(b) The membership of any such coal producer in such code and his right to an exemption from the taxes imposed by section 3 (b) of this Act, may be revoked by the Commission upon written complaint by any code member or district board, or any State or political subdivision of a State, or the consumers' counsel, after a hearing, with thirty days' written notice to the member, upon proof that such member has willfully violated any provision of the code or any regulation made thereunder; and in such a hearing any code member or district board, or any State or political subdivision of a State, or the consumers' counsel, or any consumer or employee, and the Commissioner of Internal Revenue, shall be entitled to present evidence and be heard: Provided, That the Commission, in its discretion, may in such case make an order directing the code member to cease and desist from violations of the code and regulations made thereunder and upon failure of the code member to comply with such order the Commission may apply to a circuit court of appeals to enforce such order in accordance with the provisions of subsection (c) of section 6 or may reopen the case upon ten

days' notice to the code member affected and proceed in the hearing thereof as above provided.

The Commission shall keep a record of the evidence heard by it in any proceeding to cancel or revoke the membership of any code member and its findings of fact, if supported by substantial evidence, shall be conclusive upon any proceeding to review the action and order of the Commission in any court of the United States.

In making an order revoking membership in the code as in this subsection provided, the Commission shall specifically find (1) the day or days on which the violations occurred; (2) the quantity of coal sold or otherwise disposed of in violation of the code or regulations thereunder; (3) the sales price at the mine or the market value at the mine if disposed of otherwise than by sale at the mine, or if sold otherwise than through an arms' length transaction, of the coal sold or otherwise disposed of by such code member in violation of the code or regulations thereunder; (4) the minimum price established by the Commission for such coal and in effect at the time of such sale or other disposal; (5) the amount of tax required to be paid by the code member as a condition to reinstatement to membership in the code as in subsection (c) hereof provided.

(c) Any producer whose membership in the code and whose right to an exemption from the tax imposed by section 3 (b) of this Act shall have been revoked and canceled may apply to the Commission and shall have the right to have his membership in the code restored upon payment by him to the United States of double the amount of the tax provided in section 3 (b) upon the sales price at the mine, or the market value at the mine if disposed of otherwise than by sale at the mine, or if sold otherwise than through an arms' length transaction, of the coal sold or disposed of by the code member in violation of the

code or regulations thereunder (but in no case shall such sales price or market value be taken to be less than the minimum price established by the Commission for such coal and in effect at the time of such sale or other disposal); as found by the Commission under subsection (b) hereof. The Commission shall thereupon certify to the Commissioner of Internal Revenue and to the collector of internal revenue for the internal revenue collection district in which the producer resides the amount of the required payment as found under clause (5) of subsection (b), and upon payment of such amount to the Commissioner or the collector such officer shall notify the Commission thereof.

(d) Any code member who shall be injured in his business or property by any other code member by reason of the doing of any act which is forbidden or the failure to do any act which is required by this Act or by the code or any regulation made thereunder, may sue therefor in any court of competent jurisdiction where the defendant resides, or is found or has an agent or a place of business, without respect to the amount in controversy, and shall recover threefold damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Sec. 6. (a) All rules, regulations, determinations, and promulgations of any district board shall be subject to review by the Commission upon appeal by any producer and upon just cause shown shall be amenable to the order of the Commission; and appeal to the Commission shall be a matter of right in all cases to every producer and to all parties in interest, including any State or any political subdivision thereof. In the event that a district board shall fail, for any reason, to take action authorized or required by this Act, then the Commission may take such action in lieu of the district board. The Commission may

also provide rules for the determination of controversies arising under this Act by voluntary submission thereof to arbitration, which determination shall be final and conclusive.

(b) Any person aggrieved by an order issued by the Commission in a proceeding to which such person is a party may obtain a review of such order in the Circuit Court of Appeals of the United States, within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified shall be forthwith served upon any member of the Commission and thereupon the Commission shall certify and file in the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, and enforce or set aside such order, in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged below. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the hearing before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts, by reason of the additional evidence so taken.

and it shall file such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, and enforcing or setting aside, in whole or in part, any such order of the Commission shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

The commencement of proceedings under this subsection shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

(c) If any code member fails or neglects to obey any order of the Commission while the same is in effect, the Commission in its discretion may apply to the Circuit Court of Appeals of the United States within any circuit where such code member resides or carries on business, for the enforcement of its order, and shall certify and file with its application a transcript of the entire record in the proceeding, including all the testimony taken and the report and order of the Commission. Upon such filing of the application and transcript the court shall cause notice thereof to be served upon such code member and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the Commission. The findings of the Commission as to facts, if supported by substantial evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce

such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper.

The Commission may modify its findings as to the facts or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which if supported by substantial evidence shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(d) The jurisdiction of the Circuit Court of Appeals of the United States or the United States Court of Appeals for the District of Columbia, as the case may be, to enforce, set aside, or modify orders of the Commission shall be exclusive.

Sec. 7. All provisions of law, including penalties and refunds, applicable in respect of the taxes imposed by Title IV of the Revenue Act of 1932, as amended, shall, insofar as applicable and not inconsistent with the provisions of this Act, be applicable with respect to taxes imposed under this Act.

Sec. 8. (a) The members of the Commission are authorized to administer oaths to witnesses appearing before the Commission and to authorize the taking of depositions in any proceedings; and, for the purpose of conducting its investigations, said Commission shall have full power to

issue subpoenas and subpoenas duces tecum, which shall be as nearly as may be in the form of subpoenas issued by district courts of the United States. In case of contumacy by or refusal to obey a subpoena issued to, any person, the Commission may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers, correspondence, memoranda, and other records. Upon the filing of the application for such aid with the clerk of the court the court shall, either in term time or vacation, forthwith enter an order of record, requiring such person to appear before such court at a time stated in the order not more than ten days from the entry of the order (unless for good cause shown such time is extended), and show cause why he should not be required to obey such subpoena, and upon his failure to show cause it shall be the duty of the court to order such witness to appear before the said Commission and give such testimony or produce such evidence as may be lawfully required by said Commission. The district court, either in term time or vacation, shall have full power to punish for contempt as in other cases of refusal to obey the process and order of such court. Witnesses summoned before the Commission or when depositions are taken upon order of the Commission, shall be paid the same fees and mileage as are paid witnesses in the courts of the United States, and officers taking such depositions shall be paid the same fees as are paid for like services in courts of the United States.

(b) No person shall be excused from attending and testifying or from producing books, papers, contracts, agreements, and other records and documents before the Commission, or in obedience to the subpoena of the Commission

or any member thereof or any officer designated by it, or in any cause or proceeding instituted by the Commission, on the ground that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subject to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, documentary or otherwise, except that such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.

Sec. 9. (a) It is hereby declared to be the public policy of the United States that—

(1) Employees of producers of coal shall have the right to organize and to bargain collectively with respect to their hours of labor, wages, and working conditions through representatives of their own choosing, without restraint, coercion, or interference on the part of the producers.

(2) No producer shall interfere with, restrain, or coerce employees in the exercise of their said rights, nor discharge or discriminate against any employee for the exercise of such rights.

(3) No employee of any producer and no one seeking employment with him or it shall be required as a condition of employment to join any association of employees for collective bargaining in the management of which the producer has any share of direction or control.

(b) No coal (except coal with respect to which no bid is required by law prior to purchase thereof) shall be purchased by the United States, or by any department or

agency thereof, produced at any mine where the producer failed at the time of the production of such coal to accord to his or its employees the rights set forth in subsection (a) of this section.

(c) On the complaint of any employee of a producer of coal, or other interested party, the Commission may hold a hearing to determine whether any producer supplying coal for the use of the United States or any agency thereof, is complying with the provisions of subsection (a) of this section. If the Commission shall find that such producer is not complying with such provisions, it shall certify its findings to the department or agency concerned. Such department or agency shall thereupon declare the contract for the supply of the coal of such producer to be canceled and terminated.

(d) Nothing contained in this Act or section shall be construed to repeal or modify the provisions of the Act of March 23, 1932 (ch. 90, 47 Stat. 70), or of the Act of July 5, 1935 (ch. 372, 49 Stat. 449), known as the National Labor Relations Act, or of any other Act of Congress regarding labor relations or rights of employees to organize or bargain collectively, or of the Act of June 30, 1936 (ch. 881, 49 Stat. 2036).

Sec. 10. (a) The Commission may require reports from producers and may use such other sources of information available as it deems advisable, and may require producers to maintain a uniform system of accounting of costs, wages, operations, sales, profits, losses, and such other matters as may be required in the administration of this Act. No information obtained from a producer disclosing costs of production or sales realization shall be made public without the consent of the producer from whom the same shall have been obtained, except where such disclosure is made in evidence in any hearing before the Com-

mission or any court and except that such information may be compiled in composite form in such manner as shall not be injurious to the interests of any producer and, as so compiled, may be published by the Commission.

(b) Any officer or employee of the Commission or of any district board who shall, in violation of the provisions of subsection (a), make public any information obtained by the Commission or the district board, without its authority, unless directed by a court, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine not exceeding \$500, or by imprisonment not exceeding six months, or by both fine and imprisonment, in the discretion of the court.

(c) If any producer required by this Act or the code or regulation made thereunder to file a report shall fail to do so within the time fixed for filing the same, and such failure shall continue for fifteen days after notice of such default, the producer shall forfeit to the United States the sum of \$50 for each and every day of the continuance of such failure, which forfeiture shall be payable into the Treasury of the United States, and shall be recoverable in a civil suit in the name of the United States, brought in the district where the producer has his principal office or in any district in which he shall do business. It shall be the duty of the various district attorneys, under the direction of the Attorney General of the United States, to prosecute for the recovery of forfeiture.

Sec. 11. State laws regulating the mining of coal not inconsistent herewith are not affected by this Act.

Sec. 12. Any combination between producers creating a marketing agency for the disposal of competitive coals in interstate commerce or in intrastate commerce directly affecting interstate commerce in coal at prices to be de-

terminated by such agency, or by the agreement of the producers operating through such agency, shall, after promulgation of the code provided for in section 4, be unlawful as a restraint of interstate trade and commerce within the provisions of the Act of Congress of July 2, 1890, known as the Sherman Act, and Acts amendatory and supplemental thereto, unless such producers have accepted the code provided for in section 4 and shall comply with its provisions.

Subject to the approval of the Commission, a marketing agency may, as to its members, or such marketing agencies may, as between and among themselves, provide for the cooperative marketing of their coal, at prices not below the effective minimum prices nor above the effective maximum prices prescribed in accordance with section 4: Provided, That no such approval shall be granted by the Commission unless it shall find that the agreement under which such agency or agencies propose to function (1) will not unreasonably restrict the supply of coal in interstate commerce, (2) will not prevent the public from receiving coal at fair and reasonable prices, (3) will not operate against the public interest, and (4) that each such agency and its members have agreed to observe the effective marketing regulations and minimum and maximum prices from time to time established by the Commission and otherwise to conduct the business and operations of the agency in conformity with reasonable regulations for the protection of the public interest, to be prescribed by the Commission.

The Commission may, by order, upon complaint of any code member, district board, or member thereof, any State or political subdivision thereof, the consumers' counsel or any other interested person, or on its own motion, suspend or revoke its prior approval of any such marketing agency agreement upon finding that the regulations and orders

of the Commission or the requirements of this section have been violated. Unless and until the approval of the Commission is suspended or revoked, neither the agreement creating such marketing agency nor any agreement between such agencies, which has been approved by the Commission, nor any act done in pursuance thereof, by such agency or agencies, or the members thereof, and not in violation of the terms of the Commission's approval, shall be construed to be within the prohibitions of the anti-trust laws of the United States.

Sec. 13. If any provision of this Act or the code provided herein, or any section, subsection, paragraph, or proviso, or the application thereof to any person or circumstances, is held invalid, the remainder of this Act or code, and the application thereof to other persons or circumstances, shall not be affected thereby; and if either or any of the provisions of this Act or code relating to prices or unfair methods of competition shall be found to be invalid, they shall be held separable from other provisions not in themselves found to be invalid.

Other Duties of the Commission.

Sec. 14 (a) The Commission shall study and investigate the matter of increasing the uses of coal and the problems of its importation and exportation; and shall further investigate—

(1) The economic operations of mines with the view to the conservation of the national coal resources.

(2) The safe operation of mines for the purpose of minimizing working hazards, and for such purpose shall be authorized to utilize the services of the Bureau of Mines.

(3) The problem of marketing to lower distributing costs for the benefit of consumers.

(4) The Commission shall, as soon as reasonably possible after its appointment, investigate the necessity for the control of production of coal and methods of such control, including allotment of output to districts and producers within such districts and shall hold hearings thereon.

(b) The Commission shall annually report the results of its investigations under this section, together with its recommendations, to the Secretary of the Interior for transmission by him to Congress.

Sec. 15. Upon substantial complaint that coal prices are excessive, and oppressive of consumers, or that any district board, or producers' marketing agency, is operating against the public interest, or in violation of this Act, the Commission may hear such complaint, and its findings shall be made public; and the Commission shall make proper orders within the purview of this Act so as to correct such abuses. The Commission may institute proceedings under this section, and complaints may be made by any State or political subdivision of a State or by the consumers' counsel.

Sec. 16. To safeguard the interests of those concerned in the mining, transportation, selling, and consumption of coal, the Commission or the office of consumers' counsel is hereby vested with authority to make complaint to the Interstate Commerce Commission with respect to rates, charges, tariffs, and practices relating to the transportation of coal, and to prosecute the same. Before proceeding to hear and dispose of any complaint filed by another than the Commission, involving the transportation of coal, the Interstate Commerce Commission shall cause the Commission and the office of consumers' counsel to be notified of the proceeding and, upon application to the Interstate

Commerce Commission, shall permit the Commission and consumers' counsel to appear and be heard. The Interstate Commerce Commission is authorized to avail itself of the cooperation, services, records, and facilities of the Commission.

Sec. 17. As used in this Act—

(a) The term "coal" means bituminous coal.

(b) The term "bituminous coal" includes all bituminous, semibituminous, and subbituminous coal and shall exclude lignite, which is defined as a lignitic coal having calorific value in British thermal units of less than seven thousand six hundred per pound and having a natural moisture content in place in the mine of 30 per centum or more.

(c) The term "producer" includes all individuals, firms, associations, corporations, trustees, and receivers engaged in the business of mining coal.

(d) The term "interstate commerce" means commerce among the several States and Territories, with foreign nations, and with the District of Columbia.

(e) The term "United States" when used in a geographical sense includes only the States, the Territories of Alaska and Hawaii, and the District of Columbia.

Sec. 18. Section 3 of this Act shall become effective on the first day of the second calendar month after the enactment of this Act, unless the Commission shall not at that time have promulgated the code and forms of acceptance for membership therein, in which event section 3 of this Act shall become effective from and after the date when the Commission shall have promulgated the code and such forms of acceptances, which date shall be promulgated by Executive order of the President of the United States.

All other sections except section 20 (a), of this Act shall become effective on the day of the approval of this Act.

Sec. 19. This Act shall cease to be in effect—(except as provided in section 13 of the Revised Statutes) and any agencies and offices established thereunder shall cease to exist on and after four years from the date of the approval of this Act.

Sec. 20. (a) The Bituminous Coal Conservation Act of 1935 is hereby repealed, but such repeal shall not be effective until the consumers' counsel and a majority of the members of the Commission have been appointed.

(b) There is hereby authorized to be appropriated from time to time such sums as may be necessary for the administration of this Act. All sums heretofore or hereafter appropriated or made available to the National Bituminous Coal Commission and to the consumers' counsel of the National Bituminous Coal Commission established under the Bituminous Coal Conservation Act of 1935 are hereby transferred and made available for the uses and during the periods for which appropriated, in the administration of this Act by the National Bituminous Coal Commission and the office of the consumers' counsel herein created.

(c) The records, property, and equipment of the National Bituminous Coal Commission and the consumers' counsel, respectively, established under the Bituminous Coal Conservation Act of 1935 are hereby transferred to the Commission and the consumers' counsel, respectively, established under this Act.

Sec. 21. This Act may be cited as the Bituminous Coal Act of 1937.

No. 804

In the Supreme Court of the United States

OCTOBER TERM, 1939

SUNSHINE ANTHRACITE COAL CO., APPELLANT

v.

HOMER M. ADKINS, AS COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF ARKANSAS

**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF ARKANSAS**

BRIEF FOR THE APPELLEE

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In the Supreme Court of the United States

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No. 804

SUNSHINE ANTHRACITE COAL CO., APPELLANT

v.

HOMER M. ADKINS, AS COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF ARKANSAS

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF ARKANSAS

BRIEF FOR THE APPELLEE

OPINIONS BELOW

The final opinion of the District Court (R. 40-44) has not yet been reported. The opinion of the District Court denying appellant's motion to strike a portion of appellee's answer (R. 32-39) is reported in 31 F. Supp. 125. The opinion of the Circuit Court of Appeals for the Eighth Circuit in *Sunshine Anthracite Coal Co. v. National Bituminous Coal Commission* is reported in 105 F. (2d) 559, certiorari denied November 6, 1939, *sub nom.* *Sunshine Anthracite Coal Co. v. Ickes*, No. 410, October Term, 1939, rehearing denied December 4,

1939. This opinion may be found in the record in No. 410 (pp. 378-401), which is Volume II of the present record.¹

JURISDICTION

The judgment below was entered February 16, 1940 (R. 50). The order allowing appeal was filed March 4, 1940 (R. 119), and probable jurisdiction noted by this Court March 25, 1940. Jurisdiction of this Court rests on Section 3 of the Act of August 24, 1937, c. 754, 50 Stat. 752; 28 U. S. C. Supp. V, Sec. 380a.

QUESTIONS PRESENTED

1. Whether the regulatory and taxing provisions of the Bituminous Coal Act are constitutional.

2. Whether the tax imposed by Section 3 (b) of the Act applies to producers who are not members of the Bituminous Coal Code.

3. Whether the trial court erred in holding that in view of the decision of the Circuit Court of Appeals in *Sunshine Anthracite Coal Co. v. National Bituminous Coal Commission*, appellant could not raise the question of whether its coal was bituminous coal within the meaning of the Act.

STATUTE INVOLVED

The statute involved is the Bituminous Coal Act of 1937 (c. 127, 50 Stat. 72-91, 15 U. S. C. Supp. V, Secs. 828-851). The Act is attached at the end of this brief.

¹ References to the record in No. 410 will be in the following form: "Vol. II, R. 378."

STATEMENT

Appellant operates a coal mine in the Spadra Field, Johnson County, Arkansas (R. 4). Almost all of the coal it produces is sold to purchasers outside the State of Arkansas (R. 114).

The Bituminous Coal Act imposes a tax of one cent per ton upon the sale or disposal of bituminous coal produced within the United States (Section 3 (a)),² and an additional tax of 19½ percent of the sales price on coal sold by producers who are not members of the Bituminous Coal Code (Section 3 (b)).³ Appellant has not accepted membership in the Code (R. 3). Appellant has paid the one cent tax, but has failed and refused to pay the 19½ percent tax (R. 106). On May 3, 1938, appellee, the Collector of Internal Revenue for the District of Arkansas, demanded that appellant pay \$14,749 taxes, penalties, and interest accruing under Section 3 (b) of the Act for the period ending February 1938, and on May 5 appellee filed a notice of tax lien against appellant's property for \$15,487.12 (R. 106).

On May 9, 1938, appellant filed its complaint in this suit (R. 1). The complaint alleged that it was

² These provisions, originally contained in Section 3 of the Bituminous Coal Act, are now found in Section 3520 of the Internal Revenue Code. For purposes of convenience, the references in this brief will be to the sections in the Bituminous Coal Act.

³ Appellant claims that the 19½% tax does not apply to noncode members. See p. 39, *infra*.

impossible for appellant to pay the tax imposed by Section 3 (b) of the Coal Act and that any attempt to pay said tax would result in the destruction of appellant's business, that the 19½-percent tax was in truth a penalty and not a tax, that the coal produced by appellant was not bituminous coal within the meaning of the statutory definition but semi-anthracite coal and that accordingly appellant was not subject to the statute, and that the Act was unconstitutional for a number of reasons (R. 1-20). The complaint was subsequently amended to allege that the 19½-percent tax was only applicable to code members, and that accordingly appellant was exempt therefrom (R. 30-31). Appellant sought temporary and permanent injunctions against any steps by the appellee to collect the 19½-percent tax from it (R. 20). A three-judge court was convened, and on June 3, 1938, a temporary injunction was granted (R. 26-27). Such an injunction is still in effect (R. 51).

Before any of the above steps had been taken, proceedings had been instituted before the National Bituminous Coal Commission^{*} to determine

^{*} Since July 1, 1939, the functions of the Commission have been administered by the Bituminous Coal Division of the Department of the Interior. Reorganization Plan No. II, submitted by the President to Congress May 9, 1939, Section 4 (b); Pub. Res. No. 20, 76th Cong., 1st Sess., c. 193, approved June 7, 1939. In this brief, reference will generally be made to the National Bituminous Coal Commission rather than to the Bituminous Coal Division of the Department of the Interior.

whether appellant's coal was subject to the Act. On July 27, 1937, the Commission had established a procedure whereby coal producers could obtain a determination as to the status of their coal (Vol. II, R. 1-3), and on August 31, 1937, appellant filed with the Commission an application for exemption (Vol. II, R. 4A-4F). On September 24, 1937, the Commission ordered that a public hearing be held in Arkansas both on appellant's application for exemption and for the purpose of determining the status of coals in Arkansas generally (Vol. II, R. 5-6).

The hearing was held before an examiner on October 4, 5, and 6, 1937 (Vol. II, R. 79). Petitioner introduced evidence to the effect that coal from the Spadra field has been advertised and sold as "Arkansas anthracite" (Vol. II, R. 85); and that by certain methods of classifying coal by rank on the basis of chemical analysis, particularly that of the American Society for Testing Materials,³ petitioner's coal was semianthracite (Vol. II, R. 104). Considerable evidence was introduced in opposition to show that petitioner's coal and Spadra coal were regarded by the industry and were classified under other scientific tests as semibituminous, a

³ There was evidence that the American Society for Testing Materials, which is an organization without official status, issued certain standards as tentative in the year 1934; such standards have been changed in certain respects from year to year until the present standards were adopted in 1937, after passage of the Bituminous Coal Act of 1937 (Vol. II, R. 298-299).

high-grade bituminous coal, and resembled bituminous coal rather than Pennsylvania anthracite in physical characteristics, color of flame, methods of mining, wage scales, and competitive position in the market (Vol. II, R. 209, 215-8, 250-8, 296-8, 343-5, 359, 430-4).

On August 31, 1938, after the issuance of an examiner's report (Vol. II, R. 37), and a proposed report by the Commission (Vol. II, R. 40-45), the filing of exceptions to the proposed report (Vol. II, R. 47-51), and oral argument before the Commission, the Commission filed an opinion and order denying the application for exemption and declaring that all coal produced in certain counties in Arkansas was bituminous within the meaning of the Act (Vol. II, R. 52-65, 66-68).

On October 10, 1938, appellant filed in the Circuit Court of Appeals for the Eighth Circuit a petition to review this order, pursuant to Sections 4-A and 6 of the Coal Act (Vol. II, R. 360-363). Appellant's main contentions were that the Commission had no jurisdiction under the statute to determine what coal was subject to the Act, and that in any event the Commission's order was not supported by substantial evidence (Vol. II, R. 362-363). The case was argued before the Circuit Court of Appeals on March 14, 1939 (Vol. II, R. 377). On June 19, 1939, that court handed down an opinion affirming the Commission's decision (Vol. II, R. 378-402). On July 8, 1939, a petition for rehearing was denied (Vol. II, R. 412). The Cir-

cuit Court of Appeals held that the Commission's jurisdiction to determine the status of coal claimed to be exempt from the Act rested on two separate and distinct statutory bases: (a) the general power of the Commission to make reasonable rules and regulations for the carrying out of the provisions of the Act (Section 2 (a)), and (b) the power to pass upon applications for exemption under Section 4-A (Vol. II, R. 381-388). After reviewing the evidence at length the Court also concluded that the Commission's decision was based on substantial evidence (Vol. II, R. 390-399).

A petition for certiorari was filed in this Court on September 23, 1939, the questions presented in the petition being the same as those raised before the Circuit Court of Appeals. On November 6, 1939, this Court denied the petition, and on December 4 denied a petition for rehearing.

The above proceedings were described in the appellee's answer in this case, which answer was supplemented in order to bring before the court matters occurring after the original answer was filed (R. 21-26, 27-28). When the District Court in this case was apprised of the fact that appellant had also filed a petition in the Circuit Court of Appeals with respect to some of the same questions, it postponed the trial of this case until such time as the proceeding in the Circuit Court of Appeals might be concluded. After the final action of this Court in that proceeding, on December 4, 1939, the three-judge court was again convened, on Decem-

ber 22, to pass upon a motion by appellant to strike those portions of appellee's answer which described the proceeding before the Commission and the Circuit Court of Appeals and asserted that they were a bar to redetermination of the status of appellant's coal in the District Court (R. 28-29).⁶ On January 8, 1940, the District Court handed down an opinion denying the motion to strike (R. 32-39). The Court held that the decision of the Circuit Court of Appeals was conclusive on the question of whether appellant's coal was subject to the Act and that it would not hear evidence on that issue *de novo* (R. 39). Appellant was left free to litigate at the trial other questions raised in the complaint.

The case was tried on February 15, 1940. Evidence was introduced by appellant to support its allegations that it was financially unable to pay the 19½-percent tax (R. 52-61). Appellant sought to introduce evidence that its coal was not bituminous, but such evidence was excluded by the court in accordance with its prior ruling (R. 71-72).⁷ Ap-

⁶ The question was presented in this manner so that the parties might know in advance of trial whether the Court would hear evidence with respect to the nature of appellant's coal.

⁷ Although excluded, this evidence was offered for the record and may be found at R. 71-112.

In view of the court's ruling, the Government did not offer or introduce evidence in opposition to that submitted by appellant. Thus this record only contains evidence on one side of the question. The evidence offered by appellant

appellee introduced into evidence a certified copy of the transcript of the record of this Court in *Sunshine Anthracite Coal Co. v. Ickes*, No. 410, this Term, which contained the entire record of the proceedings before the Commission and the Circuit Court of Appeals.* Appellee also offered a stipulation of the parties stating that practically all of appellant's coal was sold in interstate commerce and reciting in summary form a description of conditions in the bituminous coal industry⁹ (R. 113-118). Appellee did not attempt to meet appellant's evidence as to irreparable injury or "extraordinary circumstances" (cf. *Miller v. Standard Nut Margarine Co.*, 284 U. S. 498). On the contrary, the Government expressly waived "its objections to the equitable jurisdiction of the court and * * * its defense under Section 3224 of the Revised Statutes" (R. 118).

did not differ in kind from that which had been introduced before the National Bituminous Coal Commission; it was merely cumulative testimony along the same lines as that of one of the witnesses before the Commission (Vol. II, R. 287-324). The opinion of the Circuit Court of Appeals analyzes this type of testimony and the weight to be given it in some detail (Vol. II, R. 394-399, 401).

*Although the record in No. 410 is a part of this record, it has not been reprinted and is before this Court in its original form, as Vol. II.

⁹The language of the stipulation is substantially the same as that of the opinion of Mr. Justice Adkins in *Carter v. Carter Coal Co.*, 63 Washington Law Reporter 986 (Sup. Ct., D. C.).

On February 16, 1940, the District Court filed findings of fact and conclusions of law (R. 44-50) and rendered an opinion (R. 40-44). The court concluded that it had jurisdiction as a court of equity (R. 49). It reaffirmed its prior ruling that it had no jurisdiction to determine whether appellant's coal was subject to the statute and that the decision of the Circuit Court of Appeals was binding upon it (R. 49). The court held the Act to be a valid exercise of the commerce power, not violative of the Fifth Amendment, and not containing an invalid delegation of legislative power, following *City of Atlanta v. National Bituminous Coal Commission*, 26 F. Supp. 606 (D. D. C.), affirmed by this Court on another ground, No. 32, this Term (R. 40). The Court held that the 19½-percent tax applied to producers who did not subscribe to the Bituminous Coal Code, that the tax was valid as effecting the valid regulatory purpose of the Act, and that the Act did not contain an improper classification by reason of the fact that this tax applied only to producers who were not members of the Code (R. 49-50).

Although the Court ordered the bill dismissed on the merits, it granted appellant a permanent injunction against collection of taxes accruing prior to December 4, 1939, the date on which this Court finally disposed of the earlier litigation ¹⁰ (R. 50-

¹⁰ Section 4-A of the Coal Act protects persons filing applications for exemption from any liability until the Com-

51). The Government has not appealed from this part of the decree. The Court also granted a stay with respect to taxes accruing after December 4, pending final disposition of this appeal (R. 51).

SUMMARY OF ARGUMENT

I

A. The price-fixing provisions of the Bituminous Coal Act of 1937 are in substance the same as those contained in the Bituminous Coal Conservation Act of 1935. Although the majority of the Court in *Carter v. Carter Coal Co.*, 298 U. S. 238, did not pass upon the validity of these provisions, the dissenting opinions indicated that they were valid.

B. Since the regulatory provisions of the Act apply only to sales in or directly affecting interstate commerce, they are a valid exercise of the federal commerce power. *United States v. Rock Royal Co-operative, Inc.*, 307 U. S. 533.

mission has acted upon the application. At the trial, the Government conceded that since the Commission had jurisdiction of appellant's application for exemption under this section, as the Circuit Court of Appeals had held, appellant would not be liable for the taxes imposed under Section 3 (b) of the Act for the period ending with the Commission's decision on August 31, 1938. The Court held that it had power to, and in view of the equities of the case that it should, extend the period of nonliability so as to include the period during which the Commission's determination was being reviewed in the courts, that is from August 31, 1938, to December 4, 1939 (R. 43-44). Since the Government has not appealed from this ruling, the questions which it raises need not be considered.

C. Statutes fixing prices do not violate the due process clause. *Mayo v. Lakeland Highlands Canning Co.*, No. 270, this Term. Even if conditions in an industry be deemed material, the burden of proving that the regulation is arbitrary or capricious and of overcoming the presumption of constitutionality is upon the person assailing the validity of the statute, and that burden has not been sustained by appellant here. Moreover, both the record in this case and facts subject to the Court's notice demonstrate that the regulatory provisions of the Bituminous Coal Act are not arbitrary, capricious, or unreasonable. A maladjustment between capacity and demand, aggravated by physical and economic factors which prevented the closing down of mines and by competitive practices peculiar to the industry, had brought about deplorable conditions in periods of general prosperity as well as of nation-wide adversity. Cf. *Appalachian Coals, Inc. v. United States*, 288 U. S. 344; *Carter v. Carter Coal Co.*, 298 U. S. 238. Indeed, the circumstances warranting the establishing of minimum prices in the coal industry were substantially the same as those described by this Court in *Nebbia v. New York*, 291 U. S. 502, with respect to the milk industry.

D. The price-fixing provisions of the Bituminous Coal Act contain much more detailed standards than those prescribed for the use of the Interstate Commerce Commission and the Secretary of Agri-

culture in fixing rates under the Interstate Commerce Act /and the Packers and Stockyards Act and in other regulatory statutes. The argument that there is an invalid delegation of legislative power is plainly without substance. Nor does the statute contain an invalid delegation of power because the Commission may determine whether coal is bituminous within the meaning of the Act. The definition of "bituminous coal" in Section 17 (b) of the statute constitutes a satisfactory standard, which is not rendered inadequate because of the possible existence of borderline cases where its application may be difficult. Cf. *Shields v. Utah Idaho Central Railroad Co.*, 305 U. S. 177.

E. The grant of authority to the Commission to determine the question of fact as to the status of coal under the Act is not an invalid delegation of judicial power. The grant of such authority to administrative agencies, subject to appropriate judicial review, has never been regarded as in violation of the Judiciary Article of the Constitution. The authority of the Commission is not final, since its decisions are reviewable by the courts. *Crowell v. Benson*, 285 U. S. 22, is not in point; appellant is admittedly engaged in interstate commerce, and no constitutional rights depend upon the factual question here in issue. Cf. *Shields v. Utah Idaho Central Railroad Co.*, 305 U. S. 177.

II

Appellant argues that it is not subject to the 19½ percent tax imposed by Section 3 (b) because the tax does not apply to producers who are not members of the code. The section provides specifically, however, that producers who become code members are exempt from the tax. If the tax is not applicable to non-code members, it cannot apply to any one. Both the language of the statute and its legislative history show that Congress did not intend to accomplish any such absurd result.

III

A. The 19½ percent tax imposed by Section 3 (b) of the Act is valid regardless of whether it is a tax or a penalty, inasmuch as the regulatory provisions which the section is aimed to effectuate are a legitimate exercise of the commerce power. There can be no question of the power of Congress to impose penalties in order to enforce laws enacted under any of the enumerated powers.

B. Appellant argues that the imposition of the 19½ percent tax only upon non-code members would constitute an arbitrary classification in violation of the due process clause. If the tax be a penalty, as appellant elsewhere contends, there can be no improper classification in applying it only to those who fail to comply with the regulatory plan which it is designed to enforce. Furthermore, the choice of whether to subject itself to the tax or the

regulatory scheme lay entirely with appellant, and appellant cannot complain because the burden of the tax now turns out to be greater than that of the system of regulation which it could voluntarily have accepted instead. In any event, the differentiation between code members and non-code members is valid as a means of equalizing the burdens imposed upon the two groups. Non-code members are free from the regulatory provisions as to prices and methods of competition, and thus have a substantial competitive advantage over code members. This in itself would "warrant the imposition of a heavier tax burden." *New York Rapid Transit Corp. v. New York*, 303 U. S. 573, 580.

IV

A. The District Court refused to permit appellant to relitigate the question of the status of its coal under the Act on the ground that that question had already been considered and decided by the Circuit Court of Appeals in *Sunshine Anthracite Coal Co. v. National Bituminous Coal Commission*, *supra*. The decision in that case is clearly *res judicata* with respect to that question. The issue raised in the two cases as to whether appellant's coal was bituminous within the meaning of Section 17 (b) of the Act is identical. Although the National Bituminous Coal Commission and the collector of internal revenue may nominally be different parties, they are in legal effect the same, both representing the

United States. Under the statute the Commission determines the applicability of the Coal Act both for regulatory and tax purposes. It is settled that there is privity between officers representing the same government, and that although a judgment entered in a case against a collector may not be binding in a suit against the United States, a judgment in an action against the United States or its representative is conclusive in a suit against a collector. *Tait v. Western Maryland Railway Company*, 289 U. S. 620. Appellant attacks the Commission's jurisdiction in the prior case. But the question of jurisdiction was expressly passed upon by the Circuit Court of Appeals, and this Court has repeatedly declared that when a jurisdictional question is presented and decided, the principles of *res judicata* apply to it as well as to other issues in the case.

B. The district court also was barred from determining the status of appellant's coal because of the existence of a complete administrative and statutory remedy, the adequacy of which has been demonstrated with respect to appellant itself. Courts of equity lack jurisdiction when such an administrative remedy exists. *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41. Moreover, the power to review the orders of the Commission is vested by the Act exclusively in the Circuit Courts of Appeals (Section 6 (b), (d)). This statutory limitation upon the jurisdiction of the district courts is valid. *Anniston Mfg. Co. v. Davis*, 301 U. S. 337.

The discretion of the court below was properly exercised in refusing to grant appellant injunctive relief against collection of taxes accruing between December 4, 1939, and the date of this Court's final decision.

ARGUMENT

I

THE REGULATORY PROVISIONS OF THE BITUMINOUS COAL ACT OF 1937 ARE CONSTITUTIONAL

A. INTRODUCTORY: THE CARTER AND ATLANTA CASES

The Bituminous Coal Conservation Act of 1935 (c. 824, 49 Stat. 991) contained regulatory provisions with respect to price fixing and methods of competition in substance identical with those in the Bituminous Coal Act of 1937. However, the 1935 Act also contained provisions which are not in the present Act, regulating hours, wages, and labor relations. In *Carter v. Carter Coal Co.*, 298 U. S. 238, six Justices of this Court held the labor provisions invalid for various reasons. The five Justices who concurred in the majority opinion ventured no opinion as to the constitutionality of the price-fixing provisions, but held that they were inseparable from the labor provisions and fell for that reason. The separate opinion of Mr. Chief Justice Hughes, dissenting on the question of separability, indicated that he thought the price-fixing provisions a valid regulation of interstate com-

merce. The dissenting opinion of Mr. Justice Cardozo, concurred in by Mr. Justice Brandeis and Mr. Justice Stone, declared that the Act was separable, and then proceeded to demonstrate that the price-fixing provisions were constitutional. Thus, no member of this Court cast doubt upon the validity of those provisions of the 1935 Act which have been reenacted in the present law, and four Justices declared or indicated that such provisions were valid.

After the *Carter* decision, Congress passed the Bituminous Coal Act of 1937. The primary differences between that Act and the 1935 Act are that (1) the labor provisions and statement of purpose found objectionable by the majority of this Court were eliminated; (2) the regulatory provisions of the Act were clearly and specifically confined to transactions in, or directly affecting, interstate commerce (as the old Act was not); and (3) minimum prices, instead of being fixed by district boards subject to change by the Commission, were to be fixed by the Commission after proposals made by the district boards. See House Report No. 294, 75th Cong., 1st Sess., pp. 2-3. These changes were made to avoid attacks which had been made upon the constitutionality of the 1935 Act.

The constitutionality of the Act of 1937 has previously been upheld by a three-judge district court in the District of Columbia. *City of Atlanta v. National Bituminous Coal Commission*, 26 F. Supp.

606, affirmed on another ground *sub nom. City of Atlanta v. Ickes*, No. 32, this Term. In a well-considered opinion, the District Court there held that the Act was valid under the commerce clause, did not violate the due-process clause, and contained no forbidden delegation of legislative power.

B. THE REGULATORY PROVISIONS OF THE ACT ARE WITHIN THE POWER OF CONGRESS UNDER THE COMMERCE CLAUSE

Section 4 of the Bituminous Coal Act of 1937 contains various regulatory provisions, including proscription of specified unfair trade practices, and authorization to the Commission to establish minimum prices and marketing rules and regulations. These provisions, however, are applicable only to sales or transactions in, or directly affecting, interstate commerce (Sec. 4). Practically all of the coal produced by appellant is sold in states other than Arkansas (R. 114). These sales are sales in interstate commerce, and the regulation by Congress of the conditions of such sales, primarily through the establishment of prices and marketing rules, constitutes a regulation of interstate commerce itself and is within the power of Congress under the commerce clause. This proposition is indisputably established by the decisions of this Court upholding the power of Congress under the commerce clause to fix the price of milk and the volume of tobacco sold in interstate com-

merce. *United States v. Rock Royal Co-operative, Inc.*, 307 U. S. 533; *Mulford v. Smith*, 307 U. S. 38; cf. *Curran v. Wallace*, 306 U. S. 1. See, also, *Baldwin v. Seelig*, 294 U. S. 511; *Lemke v. Farmers Grain Co.*, 258 U. S. 50; *Public Utilities Commission v. Attleboro Steam & Electric Co.*, 273 U. S. 83, which indicate that the states have no power to regulate prices in interstate commerce because of the existence of the paramount federal power.¹¹

Regulation of the price term of interstate sales is a regulation of interstate commerce and within the commerce power of Congress for all commodities sold in interstate commerce. The nature of the

¹¹ In his dissenting opinion in *Carter v. Carter Coal Co.*, 298 U. S. 238, 326, Mr. Justice Cardozo stated:

"(1) With reference to the first objection, the obvious and sufficient answer is, so far as the Act is directed to interstate transactions, that sales made in such conditions constitute interstate commerce, and do not merely 'affect' it. *Dahnke-Walker Milling Co. v. Bondurant*, 257 U. S. 282, 290; *Flanagan v. Federal Coal Co.*, 267 U. S. 222, 225; *Lemke v. Farmers Grain Co.*, 258 U. S. 50, 60; *Public Utilities Comm'n v. Attleboro Steam & Electric Co.*, 273 U. S. 83, 90; *Federal Trade Comm'n v. Pacific States Paper Trade Assn.*, 273 U. S. 52, 64. To regulate the price for such transactions is to regulate commerce itself, and not alone its antecedent conditions or its ultimate consequences. The very act of sale is limited and governed. Prices in interstate transactions may not be regulated by the states. *Baldwin v. Seelig*, 294 U. S. 511. They must therefore be subject to the power of the nation unless they are to be withdrawn altogether from governmental supervision. Cf. *Head Money Cases*, 112 U. S. 580, 593; Story, *Commentaries on the Constitution*, § 1082. If such a vacuum were permitted, many a public evil incidental to interstate transactions would be left without a remedy * * *"

commodity is plainly immaterial to the scope of the commerce clause. Certainly, that power must exist with respect to a product as essential to the national economy as bituminous coal.

**C. THE ACT DOES NOT VIOLATE THE DUE-PROCESS CLAUSE
OF THE FIFTH AMENDMENT**

**1. THE FIXING OF PRICES BY CONGRESS DOES NOT VIOLATE THE
DUE-PROCESS CLAUSE**

Cases recently decided by the Court establish that the due-process clause does not forbid price fixing by legislative action. In *Mayo v. Lakeland Highlands Canning Co.*, No. 270, this Term, the Court declared with respect to the Florida law permitting the fixing of prices for citrus fruit that "The mere fact that the act fixes prices is, in itself, insufficient to invalidate it". The *Rock Royal* case, *supra*, and *Nebbia v. New York*, 291 U. S. 502, which upheld federal and state regulation of milk prices, demonstrate that the federal power over interstate sales is as broad as that of the states over intrastate sales. In the *Rock Royal* case (307 U. S.; at 571), this Court said: "The power enjoyed by the states to regulate the prices for handling and selling commodities within their internal commerce rests with the Congress in the commerce between the states."

It follows that no attack against the general purpose or character of this legislation can be bottomed upon the Fifth Amendment. It is neither appropriate nor necessary to consider the economic circumstances which prompted Congress to enact

the statute. Intelligent men may differ as to whether Congress acted wisely or reasonably in providing for governmental control of the price of bituminous coal. These considerations are not properly subjects for judicial consideration. If, however, it were proper or necessary to discuss the economic background of this legislation, an overwhelming showing as to the propriety and wisdom of the congressional action could be made.

2. THE CONDITIONS IN AND THE HISTORY OF THE BITUMINOUS COAL INDUSTRY SHOW THAT THE FIXING OF PRICES IS REASONABLE AND CONSONANT WITH DUE PROCESS

Even if we assume that although the due process clause contains no general prohibition against the fixing of prices, an exercise of the power to regulate prices may be inappropriate for a particular industry, no such objection can validly be taken in the instant case. In the absence of any evidence in the record or facts of which the Court may take notice indicating that a statute fixing prices for the bituminous coal industry is arbitrary, capricious, or unrelated to a proper legislative object, we submit that the law must be upheld on its face. *United States v. Carolene Products Co.*, 304 U. S. 144; *Pacific States Box & Basket Co. v. White*, 296 U. S. 176; *Metropolitan Casualty Co. v. Brownell*, 294 U. S. 580, 584, and cases cited therein. The burden is upon the party assailing a statute to prove factually the manner in which it fails to comply with due process. No effort has been made by appellant here to sustain that burden.

But in this case we are not forced to rely merely upon the absence of evidence that the Bituminous Coal Act is arbitrary or unreasonable. Facts in the record and those of which the Court may take judicial notice affirmatively demonstrate that price fixing in the coal industry does not violate the due-process clause. The facts of record with respect to conditions in the industry are set forth in a stipulation of fact which in language and substance conforms closely to the words of Mr. Justice Adkins in his opinion in the District Court in *Carter v. Carter Coal Company*, 63 Washington Law Reporter 986. In addition to these facts, the Court may take judicial notice of the description of the industry in its own opinions (*Carter v. Carter Coal Co.*, 298 U. S. 238, 330; *Appalachian Coals, Inc. v. United States*, 288 U. S. 344, 361) and in Congressional Committee Reports and documents referred to therein.¹² The District Court based its findings of fact both upon the stipulation and upon the facts subject to its notice.

¹² The committee reports on the Bituminous Coal Act of 1937 (S. Rept. 252, H. Rept. 294, 75th Cong., 1st Sess.) do not in themselves describe in detail the condition of the industry, but they refer to the House Report on the Bituminous Coal Conservation Act of 1935 (H. Rept. 1800, 74th Cong., 1st Sess.), to the hearings held before the 1935 Act was enacted (Hearings on H. R. 8479, 74th Cong., 1st Sess.) and to numerous investigations or hearings held before Congressional committees and executive commissions as providing the factual basis for the legislation (see H. Rept. 294, *supra*, pages 1-2, 15). In particular, the committee reports refer to the findings of the district courts and the opinions

From these sources, all of which give the same picture, we summarize the conditions in the industry.

As found by the court below (R. 47), bituminous coal is the Nation's primary source of energy. It is vital to the public welfare. It supplies about 75 percent of the energy used by public utilities and in manufacturing, and about 83 percent of the fuel used by locomotives operating on the railways. The railroads of this country are largely dependent upon this industry, not only for their supplies of fuel, but also for revenue. Over a period of years the coal transported by railroads has constituted from 26 to 33 percent of their freight, and it has furnished from 16 to 19 percent of the total revenues of carriers (R. 47, 114).

The list of producers who have subscribed to the Bituminous Coal Code includes more than 11,000 members, scattered throughout 31 states.¹³ Total investment in the industry has been estimated at from 2 to 2½ billion dollars.¹⁴ It has been estimated that over 400,000 miners are employed in the industry.¹⁵

of this Court in the *Carter* and *Appalachian* cases as furnishing "adequate material from which a picture of the soft-coal industry and the need of this bill can be drawn." H. Rept. 294, *supra*, page 1. See also National Resources Committee, *Energy Resources and National Policy*, pp. 15-19, 41-122, 338 *et seq.*, 405-416.

¹³ *Energy Resources and National Policy*, *supra*, at p. 73.

¹⁴ *Id.*, p. 74.

¹⁵ *Minerals Yearbook* (1939), p. 770.

From this brief summary of facts, it is apparent that the industry regulated by the Act is of fundamental importance to the national welfare and to interstate commerce, not only in coal but also in transportation, electric power, manufactured articles, and countless other commodities. It is no exaggeration to say that the welfare of the nation depends to a substantial extent upon the stability and prosperity of the bituminous coal industry. This has been recognized by a series of investigations and regulatory endeavors by both state and federal governments, extending over a long period of years. The creation of the Federal Bureau of Mines, and state legislation relating to mine inspection, accident prevention, property rights, intrastate transportation of coal, and reporting of production and reserves represent one phase of these activities.¹⁶ At least 19 separate Congressional investigations and hearings on the subject of coal were conducted, beginning in the year 1913 and continuing almost annually until enactment of the present statute.¹⁷ And it is significant that the House Report on the Act (H. Rept. 294, 75th Cong., 1st Sess.) relies in part upon this long history and these protracted investigations to show the need for the Act. The present Act, therefore, is the culmination of years of investigation and of

¹⁶ *Energy Resources and National Policy*, *supra*, pp. 111-113.

¹⁷ H. Rept. 294, 75th Cong., 1st Sess., pp. 1, 15; see *Carter v. Carter Coal Co.*, 298 U. S. 238, 331 (dissent).

efforts to stabilize interstate commerce in this basic industry.

The chaotic conditions in the industry which led to the passage of this Act have resulted from a combination of physical and economic factors. In recent years, due largely to overexpansion of the industry during the Great War, to competition from other fuels, and to increased efficiency in the use of fuel, the amount of soft coal consumed has markedly declined¹⁸ (R. 47-48, 115). Even before the war there had been an excess of capacity over demand, and the diminution in consumption served greatly to accentuate this overcapacity¹⁹ (R. 48). Because of the high cost of temporarily shutting down a mine due to physical repairs, taxes, and royalties, operators will commonly continue to operate although the price of coal is below the cost of production (R. 48, 115). In view of the relatively high overhead costs in the operation of a mine, each operator endeavors to increase his production as long as coal can be sold above actual out-of-pocket costs. (*Ibid.*) There is a tendency to reduce prices in order to obtain sufficient orders to keep the mine running at full capacity. (*Ibid.*) As a consequence of these facts, capacity does not readily adjust itself to decreasing demand despite great re-

¹⁸ H. Rept. No. 1800, 74th Cong., 1st Sess., p. 2; *Appalachian Coals, Inc. v. United States*, 288 U. S., at 361, 369; *Carter v. Carter Coal Co.*, 298 U. S., at 330.

¹⁹ *Energy Resources and National Policy*, *supra*, note 25, at p. 15.

ductions in price. (*Ibid.*) As prices drop each producer seeks only to increase his individual production so that he may survive (R. 48). "The utilization of excess mining facilities has resulted in overproduction, which in turn, has caused a bitter struggle for markets and merciless cutthroat competition" (S. Rept. 252, 75th Cong., 1st Sess., p. 2) (R. 48). The situation was vividly described by Mr. Justice Cardozo in his opinion in the *Carter* case (298 U. S., at 330): "Overproduction was at a point where free competition had been degraded into anarchy. Prices had been cut so low that profit had become impossible for all except the lucky handful."²⁰

These circumstances were aggravated by competitive factors peculiar to the coal industry (R. 48). Consumers generally specify that they desire coal of a particular size. Since coal comes out of the mine in various sizes, unsold sizes are often produced in the course of the mining operation (R. 48, 114-115). Since it is uneconomical to store coal and since mines generally do not have storage facilities, all of the coal, including the unsold sizes, is immediately loaded into railroad cars at the mine. (*Ibid.*) In order to avoid a congestion at mine tracks and the suspension of operations which would ensue, the unsold sizes are often consigned and shipped to some consuming territory. (*Ibid.*) Because of demurrage charges, which would in time

²⁰ See also S. Rept. 252, 75th Cong., 1st Sess., pp. 2-3.

exceed the amount obtainable for the coal, producers are under pressure to slash prices on such consigned shipments. (*Ibid.*)²¹

These and other factors caused the average price of coal to drop from \$2.68 per ton in 1923 to \$1.78 in 1929 (during which period prices generally were quite stable) and to \$1.31 in 1932 (R. 48, 117). For the year 1937, a period of relatively active demand, the average loss per ton of coal was eleven cents; the larger commercial mines alone lost over \$37,000,000 during that year.²² The consequence of the fierce competition to sell at any price was that "Mining communities without number have become the habitations of misery; the vast business and professional population dependent upon the coal industry has been impoverished, while thousands of operators have been reduced to bankruptcy by irrational and destructive methods which the bill aims to end once and for all. * * * acute financial distress among operators and intense poverty among miners have prevailed during periods of general prosperity as well as in times of nationwide adversity" (S. Rept. 252, 75th Cong., 1st Sess., pp. 2-3).

The conclusion of the House committee reporting the present statute was that the condition of the

²¹ See *Appalachian Coals, Inc. v. United States*, 288 U. S., at 362-363; H. Rept. 1800, 74th Cong., 1st sess., p. 2.

²² Third Annual Report under the Bituminous Coal Act of 1937, pp. 4-5. This is the last year for which official figures are available.

bituminous coal industry "imperatively demands such regulation in order to remedy evils which seriously endanger the industry itself and the health and well-being of many people in many parts of the country" (H. Rept. 294, 75th Cong., 1st Sess., p. 1). The Senate Report states that "In the circumstances, it is believed that the only hope of a rational solution of the innumerable problems of the bituminous-coal industry lies in the Federal regulation which the bill proposes to establish" (S. Rept. 252, 75th Cong., 1st Sess., p. 3).

The circumstances outlined above demonstrate that Congress was not arbitrary or capricious in endeavoring to alleviate conditions in the bituminous coal industry through the establishment of minimum prices. In *Nebbia v. New York*, 291 U. S. 502, this Court upheld the validity under the due process clause of the fixing of prices for milk; a legislative investigation of the milk industry had "disclosed destructive and demoralizing competitive conditions and unfair trade practices which resulted in retail price-cutting and reduced the income of the farmer below the cost of production." " * * * the normal law of supply and demand was insufficient to correct maladjustments detrimental to the community" (291 U. S., at 530). As Mr. Justice Cardozo recognized in his dissenting opinion in the *Carter* case, "All this may be said, and with equal, if not greater force, of the conditions and practices in the bituminous coal industry,

not only at the enactment of this statute in August, 1935, but for many years before" (298 U. S., at 330).²³

The due-process clause does not forbid Congress from seeking to remedy such conditions by the establishment of minimum prices. "Congress was not condemned to inaction in the face of price wars and wage wars so pregnant with disaster. * * * The liberty protected by the Fifth Amendment does not include the right to persist in this anarchic riot. * * * The free competition so often figured as a social good imports order and moderation and a decent regard for the welfare of the group" (Mr. Justice Cardozo dissenting, in *Carter v. Carter Coal Co.*, 298 U. S., at 331).

Appellant's brief (pp. 37-38) asserts that the Act is invalid because it may increase the evils which afflict the coal industry. This argument is directed to the wisdom and policy of the law. "With the wisdom of the policy adopted, with the adequacy or practicability of the law enacted to for-

²³ Comparison of the facts of the coal industry with the facts of the milk industry, as described in the opinion of this Court in the *Nebbia* case, will reveal a remarkable parallel between the basic economic factors which make price fixing in each industry a reasonable exercise of governmental power. Almost every fact mentioned by this Court in the *Nebbia* case in connection with milk has its equivalent in the bituminous coal industry. See the opinion of Mr. Justice Adkins in *Carter v. Carter Coal Co.*, 63 Wash. Law Rep. 986, 990, and the "Brief for Government Officers" in this Court, No. 636, 1935 Term, pp. 162-164.

ward it, the courts are both incompetent and unauthorized to deal." *Nebbia v. New York*, 291 U. S. 502, 537.

D. THE ACT DOES NOT CONTAIN AN INVALID DELEGATION OF LEGISLATIVE POWER

As compared with other regulatory statutes of similar nature, the Act is unusual in respect of its detailed, specific, and limited authorization and direction to the regulatory agency. It is confined to one commodity, bituminous coal, which is defined in Section 17 (b). The area of regulation is expressly defined (see Annex to Act) and restricted to "domestic market" as defined in Sec. 4 (e). The duration of the Act is limited to April 25, 1941. The unfair trade practices sought to be eliminated are expressly listed (Sec. 4 (i)); and with respect to the fixing of minimum prices, the most significant portion of the statute, the Act sets forth a detailed procedure and describes elaborate standards to govern the Commission's determinations.

The basis upon which minimum prices are to be established is prescribed in the statute with clarity and precision. They are to be fixed so as to yield an average return per net ton upon the entire tonnage of each minimum-price area (a geographical region specifically defined) approximating the weighted average of the total cost per net ton of the tonnage of such minimum-price area. This is a simple mathematical standard, permitting a minimum of discretion in the agency exercising the del-

egated power. Indeed, the Act even goes so far as specifically to enumerate the elements of cost which are to be computed (Sec. 4, II (a), 3d paragraph). There is no choice as to the level at which the minimum prices are to be fixed. Congress has clearly determined and unmistakably declared its policy and laid down a narrow path for administrative action.

Similarly, Congress has described, step by step, the procedure for fixing the minimum prices and has prescribed rigid standards with which each determination must comply. It has divided the process into three phases: First, the determination of the weighted average cost of each of the minimum-price areas, the elements of cost being specifically defined; second, the classification of the various sizes and grades of coal (Sec. 4, II (a)), which "shall reflect, as nearly as possible, the relative market value of the various kinds, qualities, and sizes of coal, shall be just and equitable as between producers within the district, and shall have due regard to the interests of the consuming public"; and, third, the establishment of coordinated minimum prices for the coals so classified (Sec. 4, II (b)), so as (1) to reflect, as nearly as possible, the relative market values of the various coals at points of delivery, taking into account various specifically enumerated factors; (2) to preserve as nearly as may be existing fair competitive opportunities; (3) to be just and equitable as between

the various producing districts which are specifically defined in the Act; and (4) consistently with the process of coordination, to yield a return to each minimum-price area approximating its weighted average cost per ton.

It would have been obviously impracticable for Congress to have prescribed more detailed standards to guide administrative discretion. The standards are far more precise than those established for the use of the Interstate Commerce Commission and the Secretary of Agriculture in fixing rates under the Interstate Commerce Act ²⁴ and the Packers and Stockyards Act ²⁵ respectively. In his dissenting opinion in the *Carter Coal* case, Mr. Justice Cardozo stated—we think conservatively—that (298 U. S., at 333) “the standards established by this Act are quite as definite as others that have had the approval of this court.” ²⁶ It

²⁴ Section 15 (1) of the Interstate Commerce Act (c. 91, 41 Stat. 484, 49 U. S. C., Sec. 15 (1), authorizes the Commission to prescribe “what will be the just and reasonable” rates.

²⁵ Section 310 of the Packers and Stockyards Act (c. 64, 42 Stat. 166, 7 U. S. C., Sec. 211) authorizes the Secretary of Agriculture to prescribe “what will be the just and reasonable” rates. The validity of this provision has been established. *Tagg Bros. & Moorhead v. United States*, 280 U. S. 420.

²⁶ Compare *United States v. Rock Royal Co-operative, Inc.*, *supra*; *Currin v. Wallace*, *supra*; *New York Central Securities Corp. v. United States*, 287 U. S. 12, 24 (in the public interest); *Federal Radio Commission v. Nelson Bros. Bond & Mortgage Co.*, 289 U. S. 266, 285 (public convenience, interest, or necessity); *Avent v. United States*, 266 U. S. 127,

is difficult to see how Congress could have set up standards more precise without actually fixing the prices itself.

Appellant argues (Br., pp. 21-22) that if the Commission be permitted to determine what coal is subject to the Act, the Act contains an unconstitutional delegation of legislative power.

The Act is entitled, "An Act To regulate interstate commerce in bituminous coal, and for other purposes." The term "bituminous coal" is defined in Section 17 (b) of the Act as follows:

SEC. 17. As used in this Act—

* * * * *

(b) The term "bituminous coal" includes all bituminous, semibituminous, and subbituminous coal and shall exclude lignite, which is defined as a lignitic coal having calorific value in British thermal units of less than seven thousand six hundred per pound and having a natural moisture content in place in the mine of 30 per centum or more.

This definition serves as an adequate standard for administrative action.²⁷

and *United States v. Chemical Foundation*, 272 U. S. 1 (in the public interest); *Colorado v. United States*, 271 U. S. 153, 168, and *Chesapeake & Ohio Railway v. United States*, 283 U. S. 35, 42 (certificates of public convenience and necessity); *Wayman v. Southard*, 10 Wheat. 1; *Buttfield v. Stranahan*, 192 U. S. 470 (purity, quality, and fitness for consumption); *Union Bridge Co. v. United States*, 204 U. S. 364 (unreasonable obstruction to navigation); *Mahler v. Eby*, 264 U. S. 32 (undesirable resident).

²⁷ Compare the cases cited in Note 26.

In *Shields v. Utah Idaho Railroad Co.*, 305 U. S. 177, this Court considered a similar contention that the phrase "interurban electric railway" was too indefinite a standard to guide the Interstate Commerce Commission in determining the scope of an exemption proviso in the Railway Labor Act. In rejecting the argument, this Court said (305 U. S., at 180, 181):

Congress did not define the term "interurban." Despite the desirability of such a definition and the difficulties occasioned by its absence, the term is not so destitute of meaning that it can be denied effect as a valid description. * * * The conferring of authority upon the Interstate Commerce Commission to determine whether a particular electric railway is an interurban one cannot be regarded as an unconstitutional delegation of power. See *United States v. Chicago North Shore & M. R. Co.*, *supra*, at pp. 13, 14.

We believe that the term "bituminous coal", even undefined, is at least as specific as "interurban railway." Each expression describes something with characteristics which are generally understood by lawyers and laymen. Cf. *Heisler v. Thomas Colliery Co.*, 260 U. S. 245, 256-257, for a description of the properties of coal. Since "bituminous coal" is defined in the Coal Act, the *Shields* case is *a fortiori* in point here.

Appellant's argument that the statutory standard is too indefinite is based entirely on the premise

that there may be border-line cases where application of the statutory definition may be difficult or doubtful. No decision with respect to the problem of delegation of power has even intimated that a delegation may be unlawful because the statute does not definitely direct the decision which the administrative body must reach in each case. Indeed, the purpose of delegating authority to administrative agencies is to give them discretion to fill in such details as are necessary to effectuate legislative action. Here, too, the interurban railway cases are in point. In those cases, this Court noted that "it is not always easy to draw the line" and that "Instances may be supposed where great difficulty might be experienced in determining whether an electric railway line falls within or without the exception" (*Piedmont & Northern Railway Co. v. Interstate Commerce Commission*, 286 U. S. 299, 312; *United States v. Chicago North Shore R. Co.*, 288 U. S. 1, 10; cf. *Shields v. Utah Idaho Central R. Co.*, 305 U. S. 177, 180-181, 187). If Congress could authorize an administrative agency to determine the ultimate question of fact involved in those cases, it clearly can do so here.

E. THE ACT DOES NOT CONTAIN AN INVALID DELEGATION OF JUDICIAL POWER

Appellant has contended that if the Bituminous Coal Act be construed as authorizing the Coal Commission to determine in the first instance²⁸ what

²⁸ The determinations of the Commission are reviewable in the Circuit Court of Appeals. Sections 4-A and 6.

coal is subject to the Act, there is an unconstitutional delegation of *judicial* power to an administrative agency.

The appellant's brief does not clarify either the scope or the implications of this argument. If appellant means to argue that under the Constitution, Congress has no power to authorize administrative bodies to make limited factual determinations, subject to judicial review, the argument finds no support in the words of the Constitution and flies in the face of a half century of experience and practice approved by this Court. The use of administrative agencies to determine questions of fact has never been held to conflict with the Judiciary Article of the Constitution. See, e. g. *Shields v. Utah Idaho Central R. Co.*, 305 U. S. 177; *Rochester Telephone Corp. v. United States*, 307 U. S. 125.

If appellant's position is that the Constitution does not permit Congress to authorize an administrative agency to determine such questions of fact with finality, the argument has no application to the facts of the instant case. Orders of the Commission are reviewable by the courts (Section 6(b)). In the present case appellant has had the benefit of a full judicial review of the Commission's determination as to the status of its coal.

Appellant relies upon *Crowell v. Benson*, 285 U. S. 22. That case held that the courts must de-

termine for themselves the existence of jurisdictional facts upon which the "constitutional rights of the citizen depend" (285 U. S., at 56). Here, appellant is engaged in interstate commerce (R. 114), and there is no constitutional barrier to subjecting its sales of coal to the Bituminous Coal Act. Accordingly, this case is governed by the *Shields* case, wherein this Court said (305 U. S. at 180):

As respondent, however characterized, is engaged in interstate transportation, the question whether it should be subjected to the requirements of the Railway Labor Act relating to the adjustment of labor disputes, was one for the decision of Congress. These requirements were prescribed in the exercise by Congress of its constitutional control over interstate commerce. *Texas & New Orleans R. Co. v. Railway Clerks*, 281 U. S. 548; *Virginian Railway Co. v. System Federation No. 40*, 300 U. S. 515. As Congress was free to establish the categories which should be excepted, Congress could bring to its aid an administrative agency to determine the question of fact whether a particular railroad fell within the exception, and Congress could make that factual determination, after hearing and upon evidence, conclusive.

See *South Chicago Coal and Dock Co. v. Bassett*, No. 262, this Term, which also indicates, that *Croirell v. Benson* applies only where the question

relates to the constitutional jurisdiction of the federal agency.

II

THE 19½% TAX IS APPLICABLE TO NON-CODE MEMBERS

Appellant argues that it is not subject to the 19½% tax imposed by Section 3 (b) because that section does not apply to producers who are not members of the code. This contention that Section 3 (b) does not apply to non-code members runs contrary to its plain meaning and purport. The second sentence of Section 3 (b) provides that producers of coal who become code members are exempt from the tax imposed by the previous sentence. If the tax is not applicable to non-code members, it is not applicable to anyone. It cannot be assumed that Congress intended to arrive at so absurd a result.

Appellant bases its argument on the provision in Section 3 (b) that the tax shall be imposed upon sales of coal by a producer thereof, "which would be subject to the application of the conditions and provisions of the code provided for in section 4, or of the provisions of section 4-A". Since only code members are subject to the Code provided for in Section 4, it is argued that the tax is inapplicable to non-code members.

The argument is based on a misinterpretation of the language of the Act. Section 4, setting out the

provisions of the Code, is by its terms applicable "to matters and transactions in or directly affecting interstate commerce in bituminous coal". Section 3 (b) applies to the sale and disposition of coal which "would be" subject to the application of Section 4 or Section 4-A, i. e., to coal in or affecting interstate commerce, not to coal which is subject to those provisions. The use of the subjunctive was undoubtedly deliberate. The tax was intended to apply only to those sales by non-code members which would be subject to regulation if the producer were a code member. The obvious purpose of the provision is to avoid constitutional difficulties which might arise if the 19½% tax applied to sales which could not be regulated under the commerce power.²⁹

That this construction is the proper one seems clear enough from the language of the Act. Were the matter at all doubtful, the legislative history removes any possible ambiguity. The House Committee Report (No. 294, 75th Cong., 1st Sess.)

²⁹ This limitation upon the scope of the tax imposed by Section 3 (b) was not found in the Bituminous Coal Conservation Act of 1935, which purported to rest on both the commerce and taxing powers (H. Rept. 1800, 74th Cong., 1st Sess.). The Bituminous Coal Act of 1937, which is a revision of the 1935 Act for the primary purpose of avoiding constitutional obstacles, was based solely on the commerce power (H. Rept. 294, 75th Cong., 1st Sess.). Since the 19½% tax is "in aid of the regulation of interstate commerce in coal" (*ibid.*, at p. 4), constitutional difficulties might have arisen if it had been applied to purely local transactions.

states, with respect to the tax levied by Section 3 (b) (pp. 3-4):

Another tax of 19½ percent is imposed on the sale or disposal of coal, to which the code would apply, when the producer thereof is not a code member.

* * * * *

Under subsection (b) a tax of 19½ percent is applied to coal which would be subject to the provisions in section 4 or the provisions of section 4A. Producers who are code members are exempt from this tax. This tax is intended to be in aid of the regulation of interstate commerce in coal provided for in sections 4 and 4A.

Further evidence that the tax was intended to be levied upon non-code members appears in Section 5 of the Act, which plainly associates non-code membership with tax liability. Furthermore, it may be noted that Section 3 (c) of the Act provides that the tax imposed by Section 3 (b) shall be collected from the "producer." This Court has held that the term "producer" as used in Section 10 (a) of the Bituminous Coal Act of 1937 includes producers who are not members of the Code. *Utah Fuel Company v. National Bituminous Coal Commission*, 306 U. S. 56. There is no valid reason why the same term should be given a different meaning when used in Section 3 (b).

As heretofore stated, plaintiff's construction would make the entire taxing provision meaningless, for the only persons who would be subject to

the tax are those who are exempt from it. Such a construction could not be accepted even if the meaning of Section 3 (b) were really doubtful. "To construe statutes so as to avoid results glaringly absurd, has long been a judicial function. Where, as here, the language is susceptible of a construction which preserves the usefulness of the section, the judicial duty rests upon this Court to give expression to the intendment of the law." *Armstrong Paint and Varnish Works v. Nu Enamel Corp.*, 305 U. S. 315, 333. Cf. *United States v. Ryan*, 284 U. S. 167, 175; *Sorrells v. United States*, 287 U. S. 435, 446-448, and cases there cited.

III

THE 19½% TAX IMPOSED BY SECTION 3 (b) OF THE BITUMINOUS COAL ACT IS VALID

A. THE 19½% TAX IS VALID AS A SANCTION TO ENFORCE THE REGULATORY PROVISIONS OF THE ACT

Section 3 (b) of the Bituminous Coal Act imposes a 19½% tax on sales of coal subject to the regulatory provisions of the Act, with an exemption for those producers who are members of the Bituminous Coal Code (see pp. 39-43 *supra*). It is contended that this tax is not a true tax but a penalty to compel compliance with the regulatory provisions contained in the Code. Although we believe that the exaction is a tax, we agree with the court below (R. 42) that "the question of nomenclature" is immaterial. If Section 3 (b) be regarded as a penalty, it would not for that reason

be invalid, as long as the regulatory features of the Act which it is aimed to effectuate are a legitimate exercise of the commerce power.³⁰

No one would deny that Congress may impose penalties in order to enforce laws enacted under any of the enumerated powers. The power exercised is in no way diminished or lost by the fact that Congress used a tax as one of the sanctions for enforcing it. Since Congress could have imposed the same liability and denominated it a penalty, no constitutional rights are infringed by its imposition as a tax. In *United States v. Butler*, 297 U. S. 1, 61, 69, the Court declared:

It does not follow that as the act is not an exertion of the taxing power and the exaction not a true tax, the statute is void or the exaction uncollectible. For, to paraphrase what was said in the *Head Money Cases* (*supra*), p. 596, if this is an expedient regulation by Congress, of a subject within one of its granted powers, "and the end to be attained is one falling within that power, the act is not void, because, within a loose and more extended sense than was used in the Constitution," the exaction is called a tax.

* * * * *

³⁰ It was apparently assumed in all three opinions written by this Court in *Carter v. Carter Coal Co.*, 298 U. S. 238, that the taxes imposed by the Bituminous Coal Conservation Act of 1935 would have been valid if the regulatory provisions of that Act had come within the scope of the commerce power.

The power of taxation, which is expressly granted, may, of course, be adopted as a means to carry into operation another power also expressly granted.

See also *Board of Trustees v. United States*, 289 U. S. 48, 58-59; *Veazie Bank v. Fenno*, 8 Wall. 533; *Head Money Cases*, 112 U. S. 580.

Since the Bituminous Coal Act is valid under the commerce clause (see pp. 19-21, *supra*), there can be no question as to the constitutionality of the taxes imposed.

B. THE EXEMPTION OF CODE MEMBERS FROM SECTION 3 (b) DOES NOT CONSTITUTE AN ARBITRARY CLASSIFICATION

Appellant argues that if the 19½% tax applies to non-code members and not to code members, Section 3 (b) contains an arbitrary classification in violation of the due process clause. Even if we assume that the Fifth Amendment—which has no equal protection clause—prohibits such classifications (cf. *Steward Machine Co. v. Davis*, 301 U. S. 548, 584), there are three reasons why it does not invalidate the statutory provision here under consideration.

1. In the first place, there is no "classification" if the 19½% tax is a sanction to force producers to become code members and to comply with the regulatory provision of the code, as appellant has argued (Br., p. 32). Neither the due-process nor equal-protection clause has ever been regarded

as prohibiting the imposition of a penalty upon those who fail to comply with a regulatory scheme. Cf. *Mulford v. Smith*, 307 U. S. 38, which upheld a statute permitting growers wishing to market more tobacco than their statutory quotas to do so upon payment of a penalty of 50% of the price.³¹

2. Secondly, under the Coal Act, no producer can complain of the alleged "classification," inasmuch as it is entirely optional with him in which category he appears. Congress could constitutionally have required all coal producers to join the code, or to comply with similar regulatory provisions without a code. It did not do so, but gave them a choice. Certainly appellant cannot complain because it and other producers have been given an opportunity to accept other burdens in lieu of joining the code. If those burdens now seem heavy, it results entirely from appellant's own choosing.

The existence of this option distinguishes this case from those in which the question of "classification" is usually considered. In such cases, persons who are engaged in a particular activity are not given a choice between two alternative methods of

³¹ Appellant states that a code member may violate the prices and rules of the Bituminous Coal Division and "still be immune from any penalty" (Brief, pp. 33-34). This is not correct. Under Section 5 such a code member could be expelled from the Code and required to pay a 39% tax on all coal which he had sold in violation of the Code as a prerequisite to reinstatement.

regulation, as here. If there is any choice, it is only between compliance with a statute or ceasing to engage in the activity regulated.

* 3. Finally, the differentiation between code members and non-code members would nevertheless be valid as a means of equalizing the burdens imposed upon the two groups. Code members may not sell below prices fixed under the statute. They cannot engage in any of the thirteen unfair methods of competition specifically proscribed. Section 4-II (a). They must pay assessments to the district boards and file various kinds of reports with the administrative agency.

At most, only arbitrary or irrational classifications are forbidden by the due-process clause. *Steward Machine Co. v. Davis*, *supra*; *Carmichael v. Southern Coal & Coke Co.*, 301 U. S. 495; *Paramino Lumber Co. v. Marshall*, No. 271, this Term. There is nothing arbitrary or irrational in making a distinction upon the basis of freedom from regulation. Non-code members constitute a class which is not only free to engage in unrestricted competition itself, but is protected from such competition on the part of code members, who cannot reduce prices below those established under the Act or engage in a number of prohibited competitive practices.

²² Although prices have not yet been established, code members have been bound by the other statutory provisions referred to.

"Freedom from unlimited, direct, private competition is of itself a sufficient advantage over ordinary businesses to warrant the imposition of a heavier tax burden." *New York Rapid Transit Corp. v. New York*, 303 U. S. 573, 580. Classifications exempting persons subject to compensating burdens have frequently been upheld. *Travellers' Insurance Co. v. Connecticut*, 185 U. S. 364; *General American Tank Car Corp. v. Day*, 270 U. S. 367; *Gregg Dyeing Co. v. Query*, 286 U. S. 472; *Concordia Fire Insurance Co. v. Illinois*, 292 U. S. 535, 547, 548; *Aero Mayflower Transit Co. v. Georgia Public Service Commission*, 295 U. S. 285, 290, 291; *Henneford v. Silas Mason Co.*, 300 U. S. 577. Clearly the distinction between persons subject to the code and other producers affords a reasonable basis for separate treatment here.

IV

THE DISTRICT COURT DID NOT ERR IN REFUSING TO DETERMINE *DE NOVO* WHETHER APPELLANT'S COAL WAS SUBJECT TO THE BITUMINOUS COAL ACT

The first count (entitled Paragraph One) (R. 1-7) of appellant's complaint alleges that appellant is not subject to the Bituminous Coal Act because its coal is anthracite or semianthracite and not bituminous.

Prior to the commencement of this case, appellant had petitioned the National Bituminous Coal Commission to hold it exempt from the statute,

pursuant to a procedure which the Commission had established, on the ground that appellant's coal was not "bituminous" within the meaning of Section 17 (b) of the Bituminous Coal Act. The Commission combined a hearing on appellant's petition with a general investigation as to the status of Arkansas coal. Evidence had been heard and proposed reports of the Commission finding appellant subject to the Act filed before this suit in the District Court was commenced (Vol. II, R. 37, 40-47). Appellant filed exceptions to the proposed reports, asserting both that the Commission had no jurisdiction to determine the status of its coal, and that the evidence compelled the opposite conclusion (Vol. II, R. 47-50.) Several months after the suit was filed, the Commission rendered its final decision. It held that it had jurisdiction to decide what coals were subject to the Act (Vol. II, R. 55-57) and that appellant's coal was bituminous within the meaning of the Act (Vol. II, R. 59-65). Appellant thereupon filed a petition for review in the Circuit Court of Appeals for the Eighth Circuit (Vol. II, R. 360-376), in which it attacked the Commission's decision on both the above grounds, as well as for other reasons which need not be mentioned here (Vol. II, R. 362-363). The Court of Appeals considered these questions at length and held that the Commission had jurisdiction and that its decision was supported by substantial evidence and must be affirmed (Vol. II, R. 377-402). In a

petition for rehearing, appellant again presented the same questions to the Court of Appeals (Vol. II, R. 402-411). The petition was denied (Vol. II, R. 412). Appellant then filed a petition for certiorari in this Court raising the same questions. The petition was denied. A petition for rehearing was filed, advancing the same objections. This petition was denied.

The ultimate issue decided in the litigation before the Commission, the Circuit Court of Appeals, and this Court was whether the appellant's coal was "bituminous" within the meaning of Section 17 (b) of the Bituminous Coal Act.

When the present case came up for trial in the court below, after the termination of the above proceedings, appellant insisted upon its right to try this issue over again. It again urged that the Commission had no jurisdiction to determine the status of appellant's coal and that it was the duty of the District Court to try that question *de novo*.

The District Court refused to accept this contention. It held that the determination of this issue in the former proceeding was conclusive upon it, and also that the existence of the statutory remedy before the Commission and the Circuit Court of Appeals deprived the district courts of jurisdiction to determine such questions at all (R. 32-39, 49). We submit that this decision was correct on both grounds.

A. THE JUDGMENT OF THE CIRCUIT COURT OF APPEALS
ESTOPS APPELLANT FROM REASSERTING HERE THAT
ITS COAL IS NOT BITUMINOUS

1. *Basic Principles and Policy.*—The fundamental principles with respect to the doctrines of *res judicata* and estoppel by judgment are well settled. A judgment is an absolute bar and estoppel to a second action upon the same claim or demand, between the same parties or those in privity with them, “not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.” “But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered.” *Cromwell v. County of Sac*, 94 U. S. 351, 352–353; *New Orleans v. Citizens’ Bank*, 167 U. S. 371, 396; *Southern Pacific R. Co. v. United States*, 168 U. S. 1, 48; *Myers v. International Trust Company*, 263 U. S. 64, 70–71; *United States v. Moser*, 266 U. S. 236, 241.

We need not consider here into which of the above categories this case falls, inasmuch as the issue raised in Paragraph One of the complaint here is identical with that adjudicated by the Commission and the Circuit Court of Appeals in the

prior proceeding. The ultimate question in each case was whether appellant's coal was "bituminous" and subject to the Coal Act. All possible aspects of this issue—including the Commission's alleged lack of jurisdiction to determine the matter—were raised by appellant in two oral and five written arguments³³ in the former case and specifically rejected by the Circuit Court of Appeals, after thorough consideration, in its opinion.

Appellant apparently desires that this Court disregard the careful consideration already given to the status of its coal under the Act. Although appellant itself initiated the whole sequence of events running from the application for exemption before the Commission to the denial of a rehearing on the petition for certiorari by this Court, appellant's present position is that all this was entirely meaningless.

Appellant's disregard of the long litigation already conducted pointedly illustrates the reasons for and the sound policy underlying the doctrine of estoppel by judgment. It is the function of the courts to put an end to controversy, not to supply successive forums for debate. "It is just as important that there should be a place to end as that there should be a place to begin litigation." *Stoll v. Gottlieb*, 305 U. S. 165, 172. Neither the time of this Court nor the time and resources of the par-

³³ Before the Commission, the Circuit Court of Appeals and this Court.

ties should be devoted to the trial of issues which have already been determined. This rule, of course, applies fully to government cases, and questions "concerning government or public authority." *New Orleans v. Citizens' Bank*, 167 U. S. 371, 398.

2. *Identity of the Parties*.—These forceful considerations of policy are met by appellant with technical contentions. Thus, appellant contends that the earlier litigation cannot give rise to an estoppel because the suits have different parties. In both suits, of course, the Sunshine Anthracite Company was the moving party. Appellant's contention that the parties are different is based solely upon the circumstance that in the prior litigation its adversary was the Coal Commission, while it has brought the present suit against the Collector of Internal Revenue.

The doctrine of *res judicata* may apply even if the parties are not physically the same. "Identity of parties is not a mere matter of form, but of substance. Parties nominally the same may be, in legal effect, different, Bigelow on Estoppel, 6th ed., 145; and parties nominally different may be, in legal effect, the same." *Chicago, R. I. & P. Ry. v. Schendel*, 270 U. S. 611, 620.

The answer to appellant's contention may be briefly stated: Both the Collector and the Coal Commission are agencies of the United States Government. As the decided cases which we shall herein-

After discussion shows, when an issue has been adjudicated in litigation between a party and one of these agencies, it cannot be relitigated in a suit against the other agency. This doctrine was applied to the present case by the court below in the following language (R. 38):

The "tax," if any is due or enforceable, is due to the United States. To the extent that the Commission has been entrusted with powers affecting the "tax" therefor, it is an agency of the United States, and to the extent that powers have been conferred upon the Collector and his superior officers, they are also agencies of the United States. It results from the paramount and sole interest of the United States that when a valid determination has been made between a party and an officer or agency of the United States in official capacity, it is conclusive between the party and any other officer of the government authorized as an agency of the government in respect to the same matter.

It will be helpful to an understanding of the problem to state briefly the relationship between the Coal Commission and the Commissioner of Internal Revenue in the administration of the Act. The Commissioner is, of course, merely the agency to collect the taxes levied by the Act in order to effectuate the regulatory program. The 19½% tax applies only to the sale or disposal of coal "which could be subject to the application of the conditions and provisions of the code provided for in

section 4, or of the provisions of section 4-A." The Commissioner does not determine what coal is exempt from the code provisions of the Act, and accordingly from the 19½% tax. The Coal Commission performs this function. Whether the Coal Commission determines that the sale of coal is, or is not, within the purview of the Act (e. g., because the coal is sold in purely intrastate commerce or is not bituminous"), it certifies this determination to the Commissioner, who follows it as to the 19½% tax. Similarly, if a coal producer joins the Code, the Coal Commission certifies that fact to the Commissioner, and the Commissioner may not thereafter assess or collect the 19½% tax (Section 3 b)); or if a producer files an application for exemption under Section 4-A of the Act, entitling him to an exemption during the pendency of the application, the Coal Commission certifies that fact to the Commissioner who then refrains from further action as to the 19½% tax until the application is finally disposed of by the Coal Commission. This has been the constant practice of the National Bituminous Coal Commission, its successor, the Bituminous Coal Division of the Department of Interior, and the Bureau of Internal Revenue.

Determinations as to the scope of the provisions of the Act, and therefore the applicability of the tax, are made by the Coal Commission, and the Commission acts upon certifications from the Commissioner. Appellant recognized this by filing its ap-

lication for exemption with the Coal Commission, the agency which the statute clothes with authority to make determinations as to the status of coal. Having exhausted its remedy against the agency of the government which has the power to make such determinations, however, it now seeks to relitigate the issues against another agency of the government which performs a ministerial function, subordinate in respect of these matters to the Coal Commission. Appellant cannot and does not deny that it has received a full and complete hearing as to its contentions, before both the Coal Commission and the courts; and there is no reason for it to suppose that another long process of litigation will yield a different result. The most that it can hope is that, by prolonging this controversy, it will be able to secure for itself court orders relieving it from the taxes lawfully due, during the pendency of repetitious litigation.

Many cases establish the doctrine that there is no rivalry between officers of the same government, and that a judgment in a suit between a party and an officer or agency of a state or of the United States precludes relitigation of the identical question between that party and another officer of the same government. *New Orleans v. Citizens' Bank*, 167 U. S. 371, 388-389; *Bank of Kentucky v. Stone*, 88 Fed. 333, 395 (C. C. D. Ky.), affirmed by a divided Court, 174 U. S. 799; *Gunter v. Atlantic Coast Line Railroad Company*, 200 U. S.

273, 284; *Tait v. Western Maryland Railway Company*, 289 U. S. 620, 626; *Royal Oak Township v. County of Oakland*, 269 Mich. 153, 256 N. W. 837;³⁴ *Carroll v. Fullerton*, 215 Ky. 558, 286 S. W. 847; *Commonwealth v. Harkness' Admr.*, 181 Ky. 709, 205 S. W. 787; *Bernhard v. Wall*, 184 Cal. 612, 194 Pac. 1040; *Ward v. Field Museum of Natural History*, 241 Ill. 496, 89 N. E. 731; 15 R. C. L. 1029.

In *Gunter v. Atlantic Coast Line*, *supra*, a judgment against certain county treasurers was held binding upon their successors in office and also upon the Attorney General of the state. In *Bank of Kentucky v. Stone*, *supra*, a Circuit Court com-

³⁴ In *Royal Oak Township v. County of Oakland*, *supra*, the Michigan Supreme Court stated (p. 156): "The general rule is that a judgment for or against a State or municipal officer or agency in matters as to which they are entitled to represent the city or state in litigation is conclusive for or against the city or state and their other agencies. It is conclusive upon other officers of the governmental body represented in the first action as well as upon successors in office. 1 Freeman, *Judgments* (5th ed.) § 509; *State v. Sparrow*, 89 Mich. 263; *People, ex rel. Attorney General v. Railway Co.*, 157 Mich. 114; *Green v. Leoni Township Board*, 224 Mich. 498; *Skinner v. Argentine Township Board*, 238 Mich. 533; *People, ex rel. Bryant v. Holladay*, 93 Cal. 241 (29 P. 54, 27 Am. St. Rep. 186); *Bernhard v. Wall*, 184 Cal. 612 (194 Pac. 10, 40); *Blondel v. Woodbury County*, 203 Iowa 1099 (212 N. W. 335); *Conover v. Mayor of New York*, 25 Barb. (N. Y.) 513; *Lighton v. City of Syracuse*, 188 N. Y. 499 (81 N. E. 464), dictum; *Ohio Fuel Gas Co. v. City of Mt. Vernon*, 37 Ohio App. 159 (174 N. E. 260); *Commonwealth v. Harkness' Admr.*, 181 Ky. 709 (205 S. W. 787); *Harrison v. City of Fall River*, 257 Mass. 545 (154 N. E. 255)."

posed of Justice Harlan and Judges Taft and Lur-
 on held that judgments in cases against a county
 and city were binding upon the state board of val-
 uation and assessment on the ground that the parties
 were in privity. In *New Orleans v. Citizens'*
Bank, supra, judgments against government officers
 were held binding upon their successors in office.
 and recently in *Taft v. Western Maryland Rail-*
way Company, supra, this Court held (p. 627) that
 a question adjudicated between a taxpayer and the
 Government through its agent, the Commissioner
 of Internal Revenue, was binding upon a Collector
 of Internal Revenue because he was "in such priv-
 y with them that he is estopped by the judgment."
 It has been held that technically a judgment in
 a suit against a Collector of Internal Revenue is
 not *res judicata* against the United States.³⁵
 However, although a judgment entered in a case
 against a Collector may not be binding in a suit
 against the United States, a judgment in an action
 against the United States or its representative is
 conclusive in a suit against a Collector. Where
 a question has been adjudged as between a tax-
 payer and the Government or its official agent, the
 Commissioner, the Collector, being an official in-

³⁵ *Bankers Pocahontas Coal Co. v. Burnet*, 287 U. S. 308,
 11: *Sage v. United States*, 250 U. S. 33; *Bank of Kentucky*
Kentucky, 207 U. S. 258. This result is a consequence of
 the historical justification for the suit against the Collector,
 when suit could not be maintained at all if the Collector were
 viewed as standing in the place of the Government. Cf.
Moore Ice Cream Co. v. Rose, 289 U. S. 373, 382.

ferior in authority, and acting under them, is in such privity with them that he is estopped by the judgment." *Tait v. Western Maryland Railway Company*, 289 U. S. 620, at 627. The significant factor in the *Tait* case was not the relationship between the Collector and the Commissioner but the relationship of both of them to the Government.³⁶

The test is whether the Government has consented to be sued itself or to be represented by a particular officer or agent. If it has, the judgment is binding upon it and its other officials. *A fortiori*, the adverse party to the suit who remains the same in form as well as in fact is bound by the judgment.

Application of these principles to the case at bar demonstrates that the decision in the proceeding against the National Bituminous Coal Commission in the Circuit Court of Appeals is conclusive here. The Commission is an agency of the Government; indeed, it is a part of the Government. In Section 6 (b) of the Coal Act, Congress consented that the Government, through the Commission as its agent and representative, be sued in certain kinds of proceedings. The judgment as to such matters under the Coal Act binds the Government itself, and necessarily also is conclusive upon its subordinate officials and the adverse party to the litigation.

³⁶ See *Gunter v. Atlantic Coast Line Co.*, *supra*; *Bank of Kentucky v. Stone*, *supra*, where the officials bound by the prior judgments were not subordinate or inferior to the officials against whom the judgments had been entered.

Should the Court give its approval to appellant's position, it will open the door to continued relitigation of points decided in controversies with other administrative agencies. In a great number of statutes enforcement duties are placed upon both the Department or agency involved and upon the Attorney General. Thus, appeals from orders of the Federal Power Commission could be carried through to final decision by this Court and the same issues litigated once again by the same parties in a suit against the Attorney General. And in cases arising under the Utility Holding Company Act, where certain duties of enforcement are imposed upon both the Attorney General and the Postmaster General, a party could have a final determination of the same issue three times, by first appealing from the decision of the Securities and Exchange Commission and then bringing separate suits against the Attorney General and the Postmaster General in turn. The requirements of orderly judicial administration clearly do not contemplate or permit any such result.

3. *Identity of Issues.*—Appellant asserts that the "subject matter" is not the same in the two suits (Br., p. 16), that the former proceeding involved exemption from regulation, whereas the present suit involves tax liability. At most this distinction shows that the two suits involve different causes of action or claims; although in such a situa-

tion adjudication of the first cause is not an absolute bar to the second litigation it does preclude relitigation of any point or question which was litigated and determined in the first suit. *Cromwell v. County of Sac*, quoted p. 50, *supra*; *United States v. Moser*, 266 U. S. 236, 242; *Tait v. Western Maryland Ry. Co.*, *supra*. In the former proceeding the ultimate point determined was that appellant's coal was "bituminous" within the meaning of Section 17 (b) of the Bituminous Coal Act. In the present suit appellant is seeking to raise precisely the same question.

That the issues in the two cases are identical is disclosed by a comparison of the application for exemption filed with the National Bituminous Coal Commission (Vol. II, R. 4-4F) with the allegations of the complaint in this case (R. 4). Furthermore, much of the evidence offered by the appellant in this proceeding to prove that its coal was not bituminous was identical with that received in evidence before the Commission (cf. Vol. I, R. 86 and Vol. II, R. 25-30; Vol. I, R. 88-92 and Vol. II, R. 10-16), and the rest of the evidence offered was similar in content and largely cumulative. (Vol. I, R. 71-85, 93-104, 109-112). Under these circumstances the finding of fact by the District Court that the question determined in the proceeding before the Circuit Court of Appeals "is identical with the question presented in 'paragraph

one of the complaint filed in this case" is plainly correct.³⁷

4. *Jurisdiction*.—Appellant asserts as a general proposition (Br., p. 14) that the doctrine of *res judicata* does not apply unless the court rendering the judgment has jurisdiction of the cause. However, the Circuit Court of Appeals expressly passed upon the question of the Commission's jurisdiction, and this Court has repeatedly declared that, at least when a jurisdictional question is presented and decided,³⁸ "The principles of *res judicata* apply to questions of jurisdiction as well as to other issues." *Treini's v. Sunshine Mining Co.*, 308 U. S. 66, 78; *American Surety Company v. Baldwin*, 287 U. S. 156, 166; *Stoll v. Gottlieb*, 305 U. S. 165, 171-172; *Chicot County Drainage District v. Baxter State Bank*, No. 122, this Term, decided January 2, 1940; *Baldwin v. Travelling Men's Association*, 283

³⁷ Circuit Judge Woodrough, who delivered the opinion for the Circuit Court of Appeals, presided at the trial in the District Court (Vol. II, R. 378, Vol. I, R. 51-52).

³⁸ A decision may be *res judicata* on jurisdictional issues as well as others even when the jurisdictional question is not raised or passed upon, e. g. *Chicot County Drainage District v. Baxter State Bank*, No. 122, this Term, decided January 2, 1940. Under special circumstances, however, where the jurisdictional question is not raised or passed on, a judgment will not be regarded as *res judicata* with respect to the first court's jurisdiction and may be subject to collateral attack, e. g., *United States v. Fidelity and Guaranty Co.*, No. 569, this Term, decided March 25, 1940; *Kalb v. Feuerstein*, No. 120, this Term, decided January 2, 1940. The instant case does not present such a problem.

U. S. 522. The reasons for this rule, as summarized in this Court's opinion in *Stoll v. Gottlieb*, are as follows (p. 172):

* * * After a federal court has decided the question of the jurisdiction over the parties as a contested issue, the court in which the plea of *res judicata* is made has not the power to inquire again into that jurisdictional fact. We see no reason why a court, in the absence of an allegation of fraud in obtaining the judgment, should examine again the question whether the court making the earlier determination on an actual contest over jurisdiction between the parties, did have jurisdiction of the subject matter of the litigation.

* * * After a party has his day in court, with opportunity to present his evidence and his view of the law, a collateral attack upon the decision as to jurisdiction there rendered merely retries the issue previously determined. There is no reason to expect that the second decision will be more satisfactory than the first.

B. THE DISTRICT COURT HAD NO JURISDICTION TO DETERMINE THE STATUS OF APPELLANT'S COAL

Even if there had been no decision determining the status of appellant's coal under the Act, the existence of an adequate and complete statutory

remedy would have prevented the District Court from deciding that question.

The jurisdiction of courts of equity has always been limited to cases where there is no adequate remedy at law. See c. 20, 1 Stat. 82, 28 U. S. C. Sec. 384. This basic principle of equity jurisdiction reinforces the familiar doctrine that a court will not undertake to dispose of an issue when an adequate administrative and statutory remedy has not been exhausted. *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41, and cases cited therein. When such remedies have been availed of not only before the administrative body but in a circuit court of appeals and in this Court, the inability of the District Court to grant injunctive relief is even more patent.

These considerations are reinforced by express language in the Bituminous Coal Act, vesting in the circuit courts of appeals exclusive jurisdiction to review orders of the National Bituminous Coal Commission. Section 6 (b) provides that when a person aggrieved by a Commission order files a petition for review in a Circuit Court of Appeals "Upon the filing of such transcript, such court shall have exclusive jurisdiction to affirm, modify, and enforce or set aside such order, in whole or in part." That Congress intended this remedy to be exclusive is further demonstrated by an additional

provision in the Act which provides, apparently out of an abundance of caution, that (Section 6 (d)):

The jurisdiction of the Circuit Court of Appeals of the United States or the United States Court of Appeals for the District of Columbia, as the case may be, to enforce, set aside, or modify orders of the Commission shall be exclusive.

Congress has the power to create a special procedure to safeguard the rights of citizens and to make the remedy thus established an exclusive one. *Anniston Mfg. Co. v. Davis*, 301 U. S. 337, is directly in point. The procedure established for the recovery of processing taxes was there held to deprive the district courts of jurisdiction to entertain suits for refund against the Collectors of Internal Revenue. For the same reason, the District Court was without jurisdiction here.

It cannot be seriously contended that the statutory remedy under the Coal Act is inadequate. The procedure prescribed is similar to that contained in many regulatory statutes.³⁹ Section 4-A of the Coal Act contains a special guarantee of immunity for the period during which the application for exemption is before the Commission. Appel-

³⁹ Cf. Federal Trade Commission Act, as amended by Act of June 23, 1938, c. 601, 52 Stat. 1028, 15 U. S. C. Supp. V, Sec. 45; Securities Act of 1933, c. 38, 48 Stat. 80, 15 U. S. C. Sec. 77i.

lant's real grievance is not that the remedy was inadequate but that it lost the case.

Scant reference need be made to any argument that appellant had no such administrative remedy because the Commission lacked jurisdiction to determine whether particular coals are subject to the Act. Appellant itself invoked and exhausted this statutory remedy, and the decision in the former proceedings demonstrate that the remedy was an appropriate one. The question of whether the Commission had jurisdiction was fully considered by the Circuit Court of Appeals in *Sunshine Anthracite Coal Co. v. National Bituminous Coal Commission*. A detailed statement of the reasons supporting the Commission's jurisdiction may be found in the opinion in that case (105 F. (2d) 559, Vol. II, R. 381-388) and in the Government's brief in opposition to certiorari on file in this Court (No. 410, this Term).

For the reasons fully set forth in the opinion of the Circuit Court of Appeals, we submit that the National Bituminous Coal Commission had jurisdiction to determine the status of appellant's coal, subject to review by the Circuit Court of Appeals, and that the District Court was without jurisdiction to inquire into that question. As the court below well said (R. 34):

* * * By the terms of the Act it conferred jurisdiction on the Commission to

make the determination and the procedure provided for and followed by the Commission accorded to the plaintiff, a full and fair hearing and a review in the Circuit Court of Appeals which satisfied all constitutional requirements as to determination of the fact question of the plaintiff's status in respect to the administration of the Act. The nature of the fact question as it would arise in many different parts of the country practically necessitated delegation of the power to make determination to some such national body as the Coal Commission and precluded committing it to the outcome of individual law suits in many courts.

V.

APPELLANT IS NOT ENTITLED TO PERMANENT INJUNCTIVE RELIEF AGAINST TAXES ACCRUING AFTER DECEMBER 4, 1939

Appellant invokes the doctrine of *Ex parte Young*, 209 U. S. 123, in an effort to obtain permanent immunity from the payment of all taxes accruing before the termination of this litigation.

That case neither held nor indicated that the operation of all statutes imposing heavy penalties must invariably be stayed until after their validity has finally been passed on by this Court. The doctrine has been limited in the main to litigation "where the validity of the act depends upon the existence of a fact which can be determined only

after investigation of a very complicated and technical character." It does not apply to "the ordinary case of a statute upon a subject requiring no such investigation and over which the jurisdiction of the legislature is complete in any event" (*Ex parte Young*, 209 U. S., at 148). Moreover, the doctrine of necessity must be limited to statutes and administrative orders of doubtful validity. Otherwise, dilatory tactics could postpone for long periods the effective date of all laws and orders enforced by penalties.

Here, appellant has been granted permanent protection against taxes accruing up to December 4, 1939. Since that date, no extensive investigation of facts pertinent to the validity of the Act has been required or made. In the light of recent cases (*United States v. Rock Royal Co-operative, Inc.*, 307 U. S. 533), the subject of the legislation was clearly one over which the jurisdiction of Congress was complete. In *Mulford v. Smith*, 307 U. S. 38, and *Hood & Sons v. United States*, 307 U. S. 588, it was recognized that the appropriate procedure was to afford protection *pendente lite* through requiring the deposit of sums due under the statute in the registry of the court. In the light of all the facts and circumstances of this case, the District Court concluded that appellant would be given all the protection to which it was entitled by a permanent injunction against the collection of taxes for the period ending on December 4, 1939,

the date of this Court's final denial of certiorari in the prior litigation. We submit that the discretion of the lower court in this respect was properly exercised and should not be disturbed.

CONCLUSION

For the above reasons, it is respectfully submitted that the judgment of the court below should be affirmed.

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APRIL 1940.

[PUBLIC—No. 48—75TH CONGRESS]

[CHAPTER 127—1ST SESSION]

[H. R. 4985]

AN ACT

To regulate interstate commerce in bituminous coal, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That regulation of the sale and distribution in interstate commerce of bituminous coal is imperative for the protection of such commerce; that there exist practices and methods of distribution and marketing of such coal that waste the coal resources of the Nation and disorganize, burden, and obstruct interstate commerce in bituminous coal; with the result that regulation of the prices thereof and of unfair methods of competition therein is necessary to promote interstate commerce in bituminous coal and to remove burdens and obstructions therefrom.

NATIONAL BITUMINOUS COAL COMMISSION

SEC. 2. (a) There is hereby established in the Department of the Interior a National Bituminous Coal Commission (herein referred to as Commission), which shall be composed of seven members appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The Commission shall annually designate its chairman, and shall have a seal which shall be judicially recognized. Any person appointed to fill a vacancy shall be appointed only for the unexpired term of his predecessor in office. The Commission shall have an office in the city of Washington, District of Columbia, and shall convene at such times and places as the majority of the Commission shall determine. Two members of the Commission shall have been experienced bituminous coal mine workers, two shall have had previous experience as producers, but none of the members shall have any financial interest, direct or indirect, in the mining, transportation, or sale of, or manufacture of equipment for, coal (whether or not bituminous coal), oil, or gas, or in the generation, transmission, or sale of hydro-electric power, or in the manufacture of equipment for the use thereof, and shall not actively engage in any other business, vocation, or employment. Not more than one commissioner shall be a resident of any one State, and not more than one commissioner shall be a resident of any one of the districts hereinafter established, but a change in any of the boundaries of the districts, made by the Commission as hereinafter provided, shall not affect the tenure of office of any commissioner then serving. Any commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office. The Commission is authorized to appoint and fix the compensation and duties of a secretary and necessary professional, clerical, and other assistants. With the exception of the secretary, a clerk to each commissioner, the attorneys, the managers and employees of the statistical

bureaus hereinafter provided for, and such special agents, technical experts, and examiners as the Commission may require, all employees of the Commission shall be appointed and their compensation fixed in accordance with the provisions of the civil-service laws and the Classification Act of 1923, as amended. No person appointed without regard to the provisions of the civil-service laws shall be related to any member of the Commission by marriage or within the third degree by blood. The Commission is authorized to accept and utilize voluntary and uncompensated services of any person or of any official of a State or political subdivision thereof. The members of the Commission shall each receive compensation at the rate of \$10,000 per year and necessary traveling expenses. Such Commission shall have the power to make and promulgate all reasonable rules and regulations for carrying out the provisions of this Act and shall annually make full report of its activities to the Secretary of the Interior for transmission to Congress. A majority of the Commission shall constitute a quorum for the transaction of business, and a vacancy in the Commission shall not impair the right of the remaining members to exercise all the power of the Commission. No order which is subject to judicial review under section 6, and no rule or regulation which has the force and effect of law, shall be made or prescribed by the Commission, unless it has given reasonable public notice of a hearing, and unless it has afforded to interested parties an opportunity to be heard, and unless it has made findings of fact. Such findings, if supported by substantial evidence shall be conclusive upon review thereof by any court of the United States. The Commission may establish divisions, each of which divisions shall consist of not less than three of its members, as it may deem necessary for the proper dispatch of its business. Each such division shall exercise all the powers and authority of the Commission in the premises: *provided*, That any person in interest may, upon written petition, secure a review by the Commission of the report, finding, or order of such division. The Commission may by its order assign or refer any matter within its jurisdiction under this Act to an individual Commissioner, to a board composed of employees of the Commission, to an examiner, to be designated by such order, for hearing and the recommendation of an appropriate order in the premises. Each individual Commissioner, board, or examiner, when so directed by order of the Commission, shall have power to administer oaths and affirmations, to examine witnesses, and receive evidence. The Commission is authorized to make contracts for personal services in the District of Columbia and elsewhere and to establish and maintain such offices throughout the United States as it deems necessary for an effective administration of this Act, but shall maintain its principal office in the District of Columbia.

The Commission is hereby authorized to initiate, promote, and conduct research designed to improve standards and methods used in the mining, preparation, conservation, distribution, and utilization of coal and the discovery of additional uses for coal, and for such purposes shall have authority to assist educational, governmental, and other research institutions in conducting research in coal, and to do such other acts and things as it deems necessary and proper to promote the use of coal and its derivatives.

(b) (1) There is hereby established an office in the Department of the Interior to be known as the office of the consumers' counsel of the National Bituminous Coal Commission. The office shall be in charge of a counsel to be appointed by the President, by and with the advice and consent of the Senate. The counsel shall have no financial interest, direct or indirect, in the mining, transportation, or sale of, or the manufacture of equipment for, coal (whether or not bituminous coal), oil, or gas, or in the generation, transmission, or sale of hydroelectric power, or in the manufacture of equipment for the use thereof, and shall not actively engage in any other business, vocation, or employment. The counsel shall receive compensation, at the rate of \$10,000 per year and necessary traveling expenses.

(2) It shall be the duty of the counsel to appear in the interest of the consuming public in any proceeding before the Commission and to conduct such independent investigation of matters relative to the coal industry and the administration of this Act as he may deem necessary to enable him properly to represent the consuming public in any proceeding before the Commission. In any such proceeding before the Commission, the counsel shall have the right to offer any relevant testimony and argument, oral or written, and to examine and cross-examine witnesses and parties to the proceeding, and shall have the right to have subpoena or other process of the Commission issue in his behalf. Whenever the counsel finds that it is in the interest of the consuming public to have the Commission furnish any information at its command or conduct any investigation as to any matter within its authority, the counsel shall so certify to the Commission, specifying in the certificate the information or investigation desired. Thereupon the Commission shall promptly furnish to the counsel the information or promptly conduct the investigation and place the results thereof at the disposal of the counsel.

(3) The counsel is authorized to appoint and fix the compensation and duties of necessary professional, clerical, and other assistants. With the exception of a clerk to the counsel, the attorneys, and such special agents and experts as the counsel may from time to time find necessary for the conduct of his work, all employees of the counsel shall be appointed and their compensation fixed in accordance with the civil-service laws and the Classification Act of 1923, as amended. The counsel is authorized to make such expenditures as may be necessary for the performance of the duties vested in him.

(4) The counsel shall annually make a full report of the activities of his office directly to the Congress.

TAX ON COAL

SEC. 3. (a) There is hereby imposed upon the sale or other disposal of bituminous coal produced within the United States when sold or otherwise disposed of by the producer thereof an excise tax of 1 cent per ton of two thousand pounds.

The term "disposal" as used in this section includes consumption or use (whether in the production of coke or fuel, or otherwise) by a producer, and any transfer of title by the producer other than by sale.

(b) In addition to the tax imposed by subsection (a) of this section, there is hereby imposed upon the sale or other disposal of bituminous coal produced within the United States, when sold

or otherwise disposed of by the producer thereof, which would be subject to the application of the conditions and provisions of the code provided for in section 4, or of the provisions of section 4-A, an excise tax in an amount equal to $19\frac{1}{2}$ per centum of the sale price at the mine in the case of coal disposed of by sale at the mine, or in the case of coal disposed of otherwise than by sale at the mine, and coal sold otherwise than through an arms' length transaction, $19\frac{1}{2}$ per centum of the fair market value of such coal at the time of such disposal or sale. In the case of any producer who is a code member as provided in section 4 and is so certified to the Commissioner of Internal Revenue by the Commission, the sale or disposal by such producer during the continuance of his membership in the code of coal produced by him shall be exempt from the tax imposed by this subsection.

(c) The taxes imposed by this section shall be paid to the United States by the producer, and shall be payable monthly for each calendar month on or before the first business day of the second succeeding month, under such regulations and in such manner as shall be prescribed by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury.

(d) In the case of coal disposed of otherwise than by sale at the mine, and coal sold otherwise than through an arms' length transaction, the Commissioner of Internal Revenue shall determine the market value thereof. Such market value shall equal the current market price at the mine of coal of a comparable kind, quality, and size produced for market in the locality where the coal so disposed of is produced.

(e) The tax imposed by subsection (a) of this section shall not apply in the case of a sale of coal for the exclusive use of the United States or of any State or Territory of the United States or the District of Columbia, or any political subdivision of any of them, for use in the performance of governmental functions. Under regulations prescribed by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury, a credit against the tax imposed by subsection (a) of this section or a refund may be allowed or made to any producer of coal in the amount of such tax paid with respect to the sale of coal to any vendee, if the producer has in his possession such evidence as the regulations may prescribe that such coal was resold by any person for the exclusive use of the United States or of any State, Territory of the United States, or the District of Columbia, or any political subdivision of any of them, for use in the performance of governmental functions.

(f) No producer shall, by reason of his acceptance of the code provided for in section 4, or of the exemption from the tax provided in subsection (b) in this section, be held to be precluded or estopped from contesting the constitutionality of any provision of this Act or of the code, or the validity or application of either to him or to any part of the coal produced by him.

BITUMINOUS COAL CODE

SEC. 4. The provisions of this section shall be promulgated by the Commission as the "Bituminous Coal Code", and are herein referred to as the code.

Producers accepting membership in the code as provided in section 5 (a) shall be, and are herein referred to as, code members, and the provisions of such code shall apply only to such code members, except as otherwise provided by subsection (h) of part II of this section.

For the purpose of carrying out the declared policy of this Act, the code shall contain the following conditions and provisions, which are intended to regulate interstate commerce in bituminous coal and which shall be applicable only to matters and transactions in or directly affecting interstate commerce in bituminous coal:

PART I—ORGANIZATION

(a) Twenty-three district boards of code members shall be organized. Each district board shall consist of not less than three nor more than seventeen members. The number of members of the district board shall, subject to the approval of the Commission, be determined by the majority vote of the district tonnage during the calendar year 1936 represented at a meeting of the code members of the district called for the purpose of such determination and for the election of such district board; and all code members within the district shall be given notice of the time and place of the meeting. All but one of the members of the district board shall be code members or representatives of code members truly representative of all the mines of the district. The number of such producer members shall be an even number. One-half of such producer members shall be elected by the majority in number of the code members of the district represented at the aforesaid meeting. The other producer members shall be elected by votes cast in the proportion of the annual tonnage output of the code members in the district, for the calendar year preceding the date of the election: *Provided*, That not more than one officer or employee of any code member within a district shall be a member of the district board at the same time. The remaining member of each district board shall be selected by the organization of employees representing the preponderant number of employees in the industry of the district in question. The term of district board members shall be two years and until their successors are elected. The Commission shall have power to remove any member of any district board upon its finding, after due notice and hearing, that said member is guilty of inefficiency, willful neglect of duty, or malfeasance in office.

The district boards shall have power to adopt bylaws and rules of procedure, subject to approval of the Commission, and to appoint officers from within or without their own membership, to fix their terms and compensation, to provide for reports, and to employ such committees, employees, arbitrators, and other persons necessary to effectuate their purposes. Members of the district board shall serve, as such, without compensation but may be reimbursed for their reasonable expenses. The territorial boundaries or limits of the twenty-three districts are set forth in the schedule entitled "Schedule of Districts" and annexed to this Act.

Whenever the Commission upon investigation instituted upon its own motion or upon petition of any code member, district board, State or political subdivision thereof, or the consumers' counsel, after

hearing finds that the territorial boundaries or limits of any district or minimum-price area are such as to make it substantially impracticable to establish minimum prices in accordance with all the standards set forth in subsections (a) and (b) of part II of this section, and that a change in such territorial boundaries or limits or a division or consolidation of such districts or minimum-price areas would render the establishment of minimum prices in accordance with all such standards more practicable, it shall by order make such changes, divisions, and consolidations as it finds will substantially aid in such establishment of minimum prices.

(b) The expense of administering the code by the respective district boards shall be borne by the code members in the respective districts, each paying his proportionate share, as assessed, computed on a tonnage basis, in accordance with regulations prescribed by such boards with the approval of the Commission. Such assessments may be collected by the district board by action in any court of competent jurisdiction.

(c) Nothing contained in this Act shall constitute the members of a district board partners for any purpose. Nor shall any member of a district board or officer thereof be liable in any manner to anyone for any act of any other member, officer, agent, or employee of the district board. Nor shall any member or officer of a district board, exercising reasonable diligence in the conduct of his duties under this Act, be liable to anyone for any action or omission to act under this Act except for his own willful misfeasance or for nonfeasance involving moral turpitude.

(d) No action complying with the provisions of this section taken while this Act is in effect, or within sixty days thereafter, by any code member or by any district board, or officer thereof, shall be construed to be within the prohibitions of the antitrust laws of the United States.

PART II—MARKETING

The Commission shall have power to prescribe for code members minimum and maximum prices, and marketing rules and regulations, as follows:

(a) All code members shall report all spot orders to such statistical bureau hereinafter provided for as may be designated by the Commission and shall file with it copies of all contracts for the sale of coal, copies of all invoices, copies of all credit memoranda, and such other information concerning the preparation, cost, sale, and distribution of coal as the Commission may authorize or require. All such records shall be held by the statistical bureau as the confidential records of the code member filing such information.

For each district there shall be established by the Commission a statistical bureau which shall be operated and maintained as an agency of the Commission. Each statistical bureau shall be under the direction of a manager, who shall be appointed by the Commission. No producer, employee, or representative of a producer, and, except as the Commission may specifically approve, no member of a district board or employee or representative thereof shall be an employee of any statistical bureau.

Each district board shall, from time to time on its own motion or when directed by the Commission, propose minimum prices free on board transportation facilities at the mines for kinds, qualities, and sizes of coal produced in said district, and classification of coal and price variations as to mines, consuming market areas, values as to uses and seasonal demand. Said prices shall be proposed so as to yield a return per net ton for each district in a minimum price area, as such districts are identified and such area is defined in the subjoined table designated "minimum-price-area table", equal as nearly as may be to the weighted average of the total costs, per net ton, determined as hereinafter provided, of the tonnage of such minimum price area. The computation of the total costs shall include the cost of labor, supplies, power, taxes, insurance, workmen's compensation, royalties, depreciation and depletion (as determined by the Bureau of Internal Revenue in the computation of the Federal income tax) and all other direct expenses of production, coal operators' association dues, district board assessments for Board operating expenses only levied under the code, and reasonable costs of selling and the cost of administration.

MINIMUM-PRICE-AREA TABLE

Area 1: Eastern Pennsylvania, district 1; western Pennsylvania, district 2; northern West Virginia, district 3; Ohio, district 4; Michigan, district 5; Panhandle, district 6; Southern numbered 1, district 7; Southern numbered 2, district 8; that part of Southeastern district 13, comprising Van Buren, Warren, and McMinn Counties in Tennessee.

Area 2: West Kentucky, district 9; Illinois, district 10; Indiana, district 11; Iowa, district 12.

Area 3: Southeastern, district 13, except Van Buren, Warren, and McMinn Counties in Tennessee.

Area 4: Arkansas-Oklahoma, district 14.

Area 5: Southwestern, district 15.

Area 6: Northern Colorado, district 16; southern Colorado, district 17; New Mexico, district 18.

Area 7: Wyoming, district 19; Utah, district 20.

Area 8: North Dakota and South Dakota, district 21.

Area 9: Montana, district 22.

Area 10: Washington and Alaska, district 23.

The minimum prices so proposed shall reflect, as nearly as possible, the relative market value of the various kinds, qualities, and sizes of coal, shall be just and equitable as between producers within the district, and shall have due regard to the interests of the consuming public. The procedure for proposal of minimum prices shall be in accordance with rules and regulations to be approved by the Commission.

A schedule of such proposed minimum prices, together with the data upon which they are computed, including, but without limitation, the factors considered in determining the price relationship, shall be submitted by the district board to the Commission, which may approve, disapprove, or modify such proposed minimum prices to conform to the requirements of this subsection, which shall serve

as the basis for the coordination provided for in the succeeding subsection (b): *Provided*, That all minimum prices proposed for any kind, quality, or size of coal for shipment into any consuming market area shall be just and equitable as between producers within the district: *And provided further*, That no minimum price shall be proposed that permits dumping.

As soon as possible after its creation, each district board shall determine, from cost data submitted by the proper statistical bureau of the Commission, the weighted average of the total costs of the ascertainable tonnage produced in the district in the calendar year 1936. The district board shall adjust the average costs so determined, as may be necessary to give effect to any changes in wage rates, hours of employment, or other factors substantially affecting costs, exclusive of seasonal changes, so as to reflect as accurately as possible any change or changes which may have been established since January 1, 1936. Such determination and the computations upon which it is based shall be promptly submitted to the Commission by each district board in the respective minimum-price area. The Commission shall thereupon determine the weighted average of the total costs of the tonnage for each minimum-price area in the calendar year 1936, adjusted as aforesaid, and transmit it to all the district boards within such minimum-price area. Said weighted average of the total costs shall be taken as the basis, to be effective until changed by the Commission, for the proposal and establishment of minimum prices. Thereafter, upon satisfactory proof made at any time by any district board of a change in excess of 2 cents per net ton of two thousand pounds in the weighted average of the total costs in the minimum-price area, exclusive of seasonal changes, the Commission shall increase or decrease the minimum prices accordingly. The weighted average figures of total cost determined as aforesaid shall be available to the public.

Each district board shall, on its own motion or when directed by the Commission, propose reasonable rules and regulations incidental to the sale and distribution, by code members within the district, of coal. Such rules and regulations shall not be inconsistent with the requirements of this section and shall conform to the standards of fair competition hereinafter established. Such rules and regulations shall be submitted by the district board to the Commission with a statement of the reasons therefor, and the Commission may approve, disapprove, or modify the same, for the purpose of coordination.

(b) District boards shall, under rules and regulations established by the Commission, coordinate in common consuming market areas upon a fair competitive basis the minimum prices and the rules and regulations proposed by them, respectively, under subsection (a) hereof. Such coordination, among other factors, but without limitation, shall take into account the various kinds, qualities, and sizes of coal, and transportation charges upon coal. All minimum prices proposed for any kind, quality, or size of coal for shipment into any common consuming market area shall be just and equitable, and not unduly prejudicial or preferential, as between and among districts, shall reflect, as nearly as possible, the relative market values, at points of delivery in each common consuming market area, of the various kinds, qualities, and sizes of coal produced

in the various districts, taking into account values as to uses, seasonal demand, transportation methods and charges and their effect upon a reasonable opportunity to compete on a fair basis, and the competitive relationships between coal and other forms of fuel and energy; and shall preserve as nearly as may be existing fair competitive opportunities. The minimum prices proposed as a result of such coordination shall not, as to any district, reduce or increase the return per net ton upon all the coal produced therein below or above the minimum return as provided in subsection (a) of this section by an amount greater than necessary to accomplish such coordination, to the end that the return per net ton upon the entire tonnage of the minimum price area shall approximate the weighted average of the total cost per net ton of the tonnage of such minimum price area. Such coordinated prices and rules and regulations, together with the data upon which they are predicated, shall be submitted to the Commission. The Commission shall thereupon establish, and from time to time, upon complaint or upon its own motion, review and revise the effective minimum prices and rules and regulations in accordance with the standards set forth in subsections (a) and (b) of part II of this section.

(c) When, in the public interest, the Commission deems it necessary to establish maximum prices for coal in order to protect the consumer of coal against unreasonably high prices therefor, the Commission shall have the power to establish maximum prices free on board transportation facilities for coal in any district. Such maximum prices shall be established at a uniform increase above the minimum prices in effect within the district at the time, so that in the aggregate the maximum prices shall yield a reasonable return above the weighted average total cost of the district: *Provided*, That no maximum price shall be established for any mine which shall not yield a fair return on the fair value of the property.

(d) If any code member or district board or member thereof, or any State or political subdivision of a State, or the consumers' counsel, shall be dissatisfied with such coordination of prices or rules and regulations, or by a failure to establish such coordination of prices or rules and regulations, or by any minimum or maximum prices established pursuant to subsections (b) or (c) of part II of this section, he or it shall have the right, by petition, to make complaint to the Commission, and the Commission shall, under rules and regulations established by it, and after notice and hearing, make such order as may be required to effectuate the purpose of subsections (b) and (c) of part II of this section. Pending final disposition of such petition, and upon reasonable showing of necessity therefor, the Commission may make such preliminary or temporary order as in its judgment may be appropriate, and not inconsistent with the provisions of this Act.

(e) No coal subject to the provisions of this section shall be sold or delivered or offered for sale at a price below the minimum or above the maximum therefor established by the Commission, and the sale or delivery or offer for sale of coal at a price below such minimum or above such maximum shall constitute a violation of the code: *Provided*, That the provisions of this paragraph shall not apply to a

lawful and bona fide written contract entered into prior to June 16, 1933.

The making of a contract for the sale of coal at a price below the minimum or above the maximum therefor established by the Commission at the time of the making of the contract shall constitute a violation of the code, and such contract shall be invalid and unenforceable.

From and after the date of approval of this Act, until prices shall have been established pursuant to subsections (a) and (b) of part II of this section, no contract for the sale of coal shall be made providing for delivery for a period longer than thirty days from the date of the contract.

No contract shall be made for the sale of coal for delivery after the expiration date of this Act at a price below the minimum or above the maximum therefor established by the Commission and in effect at the time of making the contract.

The minimum prices established in accordance with the provisions of this section shall not apply to coal sold and shipped outside the domestic market. The domestic market shall include all points within the continental United States and Canada, and car-ferry shipments to the island of Cuba. Bunker coal delivered to steamships for consumption thereon shall be regarded as shipped within the domestic market. Maximum prices established in accordance with the provisions of this section shall not apply to coal sold and shipped outside the continental United States.

(f) All data, reports, and other information in the possession of any agency of the United States in relation to coal shall be available to the Commission and to the office of the consumers' counsel for the administration of this Act.

(g) The price provisions of this Act shall not be evaded or violated by or through the use of docks or other storage facilities or transportation facilities, or by or through the use of subsidiaries, affiliated sales or transportation companies or other intermediaries or instrumentalities, or by or through the absorption, directly or indirectly, of any transportation or incidental charge of whatsoever kind or character, or any part thereof. The Commission is hereby authorized, after investigation and hearing, and upon notice to the interested parties, to make and issue rules and regulations to make this subsection effective.

(h) The Commission shall, by order, prescribe due and reasonable maximum discounts or price allowances that may be made by code members to persons (whether or not code members), herein referred to as "distributors", who purchase coal for resale and resell it in not less than cargo or railroad carload lots; and shall require the maintenance and observance by such persons, in the resale of such coal, of the prices and marketing rules and regulations established under this section.

UNFAIR METHODS OF COMPETITION

(i) The following practices with respect to coal shall be unfair methods of competition and shall constitute violations of the code:

1. The consignment of unordered coal, or the forwarding of coal which has not actually been sold, consigned to the producer or his

at: *Provided, however,* That coal which has not actually been sold be forwarded, consigned to the producer or his agent at rail or track yards, tidewater ports, river ports, or lake ports, or docks and such ports, when for application to any of the following uses: Bunker coal, coal applicable against existing contracts, coal storage (other than in railroad cars) by the producer or his agent in rail or track yards or on docks, wharves, or other yards for sale by the producer or his agent.

The adjustment of claims with purchasers of coal in such manner as to grant secret allowances, secret rebates, or secret concessions, or other price discrimination.

The prepayment of freight charges with intent to or having the effect of granting a discriminatory credit allowance.

The granting in any form of adjustments, allowances, discounts, credits, or refunds to purchasers or sellers of coal, for the purposes with the effect of altering retroactively a price previously agreed upon, in such manner as to create price discrimination.

The predating or postdating of any invoice or contract for the purchase or sale of coal, except to conform to a bona-fide agreement for the purchase or sale entered into on the predate.

The payment or allowance in any form or by any device of credits, refunds, credits, or unearned discounts, or the extension to certain purchasers of services or privileges not extended to all purchasers under like terms and conditions, or under similar circumstances.

The attempt to purchase business, or to obtain information concerning a competitor's business by concession, gifts, or bribes.

The intentional misrepresentation of any analysis or of analyses, of sizes, or the intentional making, causing, or permitting to be made, or publishing, of any false, untrue, misleading, or deceptive statement by way of advertising, invoicing, or otherwise concerning size, quality, character, nature, preparation, or origin of any coal bought, sold, or consigned.

The unauthorized use, whether in written or oral form, of trademarks, trade names, slogans, or advertising matter already adopted by a competitor, or any deceptive approximation thereof.

Inducing or attempting to induce, by any means or device, whatever, a breach of contract between a competitor and his customer during the term of such contract.

Splitting or dividing commissions, brokers' fees, or brokerage amounts, or otherwise in any manner directly or indirectly using brokerage commissions or jobbers' arrangements or sales agencies for granting discounts, allowances, or rebates, or prices other than those determined under this Act, to any industrial consumer or to any retailer, or to others, whether of a like or different class.

Selling to, or through, any broker, jobber, commission account, sales agency, which is in fact or in effect an agency or an instrumentality of a retailer or an industrial consumer or of an organization of retailers or industrial consumers, whereby they are enabled to secure either directly or indirectly a discount, dividend, allowance, or rebates, or a price other than that determined in the manner prescribed by this Act.

Employing any person or appointing any sales agent, at a compensation obviously disproportionate to the ordinary value of

the service or services rendered, and whose employment or appointment is made with the primary intention and purpose of securing preferment with a purchaser or purchasers of coal.

It shall not be an unfair method of competition or a violation of the code or any requirement of this Act (1) to sell to or through any bona-fide and legitimate farmers' cooperative organization duly organized under the laws of any State, Territory, the District of Columbia, or the United States whether or not such organization grants rebates, discounts, patronage dividends, or other similar benefits to its members; (2) to sell through any intervening agency to any such cooperative organization; or (3) to pay or allow to any such cooperative organization or to any such intervening agency any discount, commission, rebate, or dividend ordinarily paid or allowed, or permitted by the code to be paid or allowed, to other purchasers for purchases in wholesale or middleman quantities.

(j) The Commission shall have jurisdiction to hear and determine written complaints made by any code member, district board, or member thereof, State or political subdivision of a State, or the consumers' counsel, which charge any violation of the code specified in part II of this section. It shall make and publish rules and regulations for the consideration and hearing of any such complaint, and all interested parties shall be required to conform thereto. The Commission shall make due effort toward adjustment of such complaints and shall endeavor to compose the differences of the parties, and shall make such order or orders in the premises, from time to time, as the facts and the circumstances warrant. Any such order shall be subject to review as are other orders of the Commission.

(k) In the investigation of any complaint or violation of the code, or of any rule or regulation the observance of which is required under the terms thereof, the Commission shall have power by order to require such reports from, and shall be given access to inspect the books and records of, code members to the extent deemed necessary for the purpose of determining the complaint. Any such order shall be subject to review as are other orders of the Commission.

(l) The provisions of this section shall not apply to coal consumed by the producer or to coal transported by the producer to himself for consumption by him.

SEC. 4-A. Whenever the Commission upon investigation instituted upon its own motion or upon petition of any code member, district board, State or political subdivision thereof, or the consumers' counsel, after hearing finds that transactions in coal in intrastate commerce by any person or in any locality cause any undue or unreasonable advantage, preference, or prejudice as between persons and localities in such commerce on the one hand and interstate commerce in coal on the other hand, or any undue, unreasonable, or unjust discrimination against interstate commerce in coal, or in any manner directly affect interstate commerce in coal, the Commission shall by order so declare and thereafter coal sold, delivered or offered for sale in such intrastate commerce shall be subject to the provisions of section 4.

Any producer believing that any commerce in coal is not subject to the provisions of section 4 or to the provisions of the first paragraph of this section may file with the Commission an application,

verified by oath or affirmation for exemption, setting forth the facts upon which such claim is based. The filing of such application in good faith shall exempt the applicant, beginning with the third day following the filing of the application, from any obligation, duty, or liability imposed by section 4 with respect to the commerce covered by the application until such time as the Commission shall act upon the application. If the Commission has reason to believe that such exemption during the period prior to action upon the application is likely to permit evasion of the Act with respect to commerce in coal properly subject to the provisions of section 4 or of the first paragraph of this section, it may suspend the exemption for a period not to exceed ten days. Within a reasonable time after the receipt of any application for exemption the Commission shall enter an order granting, or, after notice and opportunity for hearing, denying or otherwise disposing of such application. As a condition to the entry of and as a part of any order granting such application, the Commission may require the applicant to apply periodically for renewals of such order and to file such periodic reports as the Commission may find necessary or appropriate to enable it to determine whether the conditions supporting the exemption continue to exist. Any applicant aggrieved by an order denying or otherwise disposing of an application for exemption by the Commission may obtain a review of such order in the manner provided in subsection (b) of section 6.

ORGANIZATION OF THE CODE

SEC. 5 (a) Upon the appointment of the Commission it shall at once promulgate said code and assist in the organization of the district boards as provided for in section 4, and shall prepare and supply to all coal producers forms of acceptance for membership therein. Such forms of acceptances, when executed, shall be acknowledged before any official authorized to take acknowledgments.

(b) The membership of any such coal producer in such code and his right to an exemption from the taxes imposed by section 8 (b) of this Act, may be revoked by the Commission upon written complaint by any code member or district board, or any State or political subdivision of a State, or the consumers' counsel, after a hearing, with thirty days' written notice to the member, upon proof that such member has willfully violated any provision of the code or any regulation made thereunder; and in such a hearing any code member or district board, or any State or political subdivision of a State, or the consumers' counsel, or any consumer or employee, and the Commissioner of Internal Revenue, shall be entitled to present evidence and be heard: *Provided*, That the Commission, in its discretion, may in such case make an order directing the code member to cease and desist from violations of the code and regulations made thereunder and upon failure of the code member to comply with such order the Commission may apply to a circuit court of appeals to enforce such order in accordance with the provisions of subsection (c) of section 6 or may reopen the case upon ten days' notice to the code member affected and proceed in the hearing thereof as above provided.

The Commission shall keep a record of the evidence heard by it in any proceeding to cancel or revoke the membership of any code

member and its findings of fact, if supported by substantial evidence, shall be conclusive upon any proceeding to review the action and order of the Commission in any court of the United States.

In making an order revoking membership in the code as in this subsection provided, the Commission shall specifically find (1) the day or days on which the violations occurred; (2) the quantity of coal sold or otherwise disposed of in violation of the code or regulations thereunder; (3) the sales price at the mine or the market value at the mine if disposed of otherwise than by sale at the mine, or if sold otherwise than through an arms' length transaction, of the coal sold or otherwise disposed of by such code member in violation of the code or regulations thereunder; (4) the minimum price established by the Commission for such coal and in effect at the time of such sale or other disposal; (5) the amount of tax required to be paid by the code member as a condition to reinstatement to membership in the code as in subsection (c) hereof provided.

(c) Any producer whose membership in the code and whose right to an exemption from the tax imposed by section 3 (b) of this Act shall have been revoked and canceled may apply to the Commission and shall have the right to have his membership in the code restored upon payment by him to the United States of double the amount of the tax provided in section 3 (b) upon the sales price at the mine, or the market value at the mine if disposed of otherwise than by sale at the mine, or if sold otherwise than through an arms' length transaction, of the coal sold or disposed of by the code member in violation of the code or regulations thereunder (but in no case shall such sales price or market value be taken to be less than the minimum price established by the Commission for such coal and in effect at the time of such sale or other disposal), as found by the Commission under subsection (b) hereof. The Commission shall thereupon certify to the Commissioner of Internal Revenue and to the collector of internal revenue for the internal revenue collection district in which the producer resides the amount of the required payment as found under clause (5) of subsection (b), and upon payment of such amount to the Commissioner or the collector such officer shall notify the Commission thereof.

(d) Any code member who shall be injured in his business or property by any other code member by reason of the doing of any act which is forbidden or the failure to do any act which is required by this Act or by the code or any regulation made thereunder, may sue therefor in any court of competent jurisdiction where the defendant resides, or is found or has an agent or a place of business, without respect to the amount in controversy, and shall recover threefold damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

SEC. 6. (a) All rules, regulations, determinations, and promulgations of any district board shall be subject to review by the Commission upon appeal by any producer and upon just cause shown shall be amenable to the order of the Commission; and appeal to the Commission shall be a matter of right in all cases to every producer and to all parties in interest, including any State or any political subdivision thereof. In the event that a district board shall fail, for any reason, to take action authorized or required by this Act, then the

Commission may take such action in lieu of the district board. The Commission may also provide rules for the determination of controversies arising under this Act by voluntary submission thereof to arbitration, which determination shall be final and conclusive.

(b) Any person aggrieved by an order issued by the Commission in a proceeding to which such person is a party may obtain a review of such order in the Circuit Court of Appeals of the United States, within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall be forthwith served upon any member of the Commission and thereupon the Commission shall certify and file in the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, and enforce or set aside such order, in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged below. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the hearing before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon a hearing in such manner and upon such terms and conditions as the court may seem proper. The Commission may modify its findings as to the facts, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, and enforcing or setting aside, in whole or in part, any such order of the Commission shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

The commencement of proceedings under this subsection shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

(c) If any code member fails or neglects to obey any order of the Commission while the same is in effect, the Commission in its discretion may apply to the Circuit Court of Appeals of the United States within any circuit where such code member resides or carries on business, for the enforcement of its order, and shall certify and file with its application a transcript of the entire record in the proceeding, including all the testimony taken and the report and order of the Commission. Upon such filing of the application and transcript the court shall cause notice thereof to be served upon such code member and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to

make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the Commission. The findings of the Commission as to facts, if supported by substantial evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper.

The Commission may modify its findings as to the facts or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which if supported by substantial evidence shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(d) The jurisdiction of the Circuit Court of Appeals of the United States or the United States Court of Appeals for the District of Columbia, as the case may be, to enforce, set aside, or modify orders of the Commission shall be exclusive.

SEC. 7. All provisions of law, including penalties and refunds; applicable in respect of the taxes imposed by Title IV of the Revenue Act of 1932, as amended, shall, insofar as applicable and not inconsistent with the provisions of this Act, be applicable with respect to taxes imposed under this Act.

SEC. 8. (a) The members of the Commission are authorized to administer oaths to witnesses appearing before the Commission and to authorize the taking of depositions in any proceedings; and, for the purpose of conducting its investigations, said Commission shall have full power to issue subpoenas and subpoenas duces tecum, which shall be as nearly as may be in the form of subpoenas issued by district courts of the United States. In case of contumacy by or refusal to obey a subpoena issued to, any person, the Commission may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers, correspondence, memoranda, and other records. Upon the filing of the application for such aid with the clerk of the court the court shall, either in term time or vacation, forthwith enter an order of record, requiring such person to appear before such court at a time stated in the order not more than ten days from the entry of the order (unless for good cause shown such time is extended), and show cause why he should not be required to obey such subpoena, and upon his failure to show cause it shall be the duty of the court to order such witness to appear before the said Commission and give such testimony or produce such evidence as may be lawfully required by

said Commission. The district court, either in term time or vacation, shall have full power to punish for contempt as in other cases of refusal to obey the process and order of such court. Witnesses summoned before the Commission or when depositions are taken upon order of the Commission, shall be paid the same fees and mileage as are paid witnesses in the courts of the United States, and officers taking such depositions shall be paid the same fees as are paid for like services in courts of the United States.

(b) No person shall be excused from attending and testifying or from producing books, papers, contracts, agreements, and other records and documents before the Commission, or in obedience to the subpoena of the Commission or any member thereof or any officer designated by it, or in any cause or proceeding instituted by the Commission, on the ground that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subject to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, documentary or otherwise, except that such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.

SEC. 9. (a) It is hereby declared to be the public policy of the United States that—

(1) Employees of producers of coal shall have the right to organize and to bargain collectively with respect to their hours of labor, wages, and working conditions through representatives of their own choosing, without restraint, coercion, or interference on the part of the producers.

(2) No producer shall interfere with, restrain, or coerce employees in the exercise of their said rights, nor discharge or discriminate against any employee for the exercise of such rights.

(3) No employee of any producer and no one seeking employment with him or it shall be required as a condition of employment to join any association of employees for collective bargaining in the management of which the producer has any share of direction or control.

(b) No coal (except coal with respect to which no bid is required by law prior to purchase thereof) shall be purchased by the United States, or by any department or agency thereof, produced at any mine where the producer failed at the time of the production of such coal to accord to his or its employees the rights set forth in subsection (a) of this section.

(c) On the complaint of any employee of a producer of coal, or other interested party, the Commission may hold a hearing to determine whether any producer supplying coal for the use of the United States or any agency thereof, is complying with the provisions of subsection (a) of this section. If the Commission shall find that such producer is not complying with such provisions, it shall certify its findings to the department or agency concerned. Such department or agency shall thereupon declare the contract for the supply of the coal of such producer to be canceled and terminated.

(d) Nothing contained in this Act or section shall be construed to repeal or modify the provisions of the Act of March 23, 1932 (ch.

7 Stat. 70), or of the Act of July 5, 1935 (ch. 372, 49 Stat. 449), or of the National Labor Relations Act, or of any other Act of Congress regarding labor relations or rights of employees to organize or bargain collectively, or of the Act of June 30, 1936 (ch. 881, 49 Stat. 2036).

Sec. 10. (a) The Commission may require reports from producers and may use such other sources of information available as it deems reasonable, and may require producers to maintain a uniform system of accounting of costs, wages, operations, sales, profits, losses, and other matters as may be required in the administration of this

No information obtained from a producer disclosing costs of production or sales realization shall be made public without the consent of the producer from whom the same shall have been obtained, except where such disclosure is made in evidence in any hearing before the Commission or any court and except that such information may be compiled in composite form in such manner as shall not be prejudicial to the interests of any producer and, as so compiled, may be published by the Commission.

(b) Any officer or employee of the Commission or of any district court who shall, in violation of the provisions of subsection (a), disclose to the public any information obtained by the Commission or the district board, without its authority, unless directed by a court, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine not exceeding \$500, or by imprisonment not exceeding six months, or by both fine and imprisonment, in the discretion of the court.

(c) If any producer required by this Act or the code or regulation thereunder to file a report shall fail to do so within the time specified for filing the same, and such failure shall continue for fifteen days after notice of such default, the producer shall forfeit to the United States the sum of \$50 for each and every day of the continuance of such failure, which forfeiture shall be payable into the Treasury of the United States, and shall be recoverable in a civil suit in the district of the United States, brought in the district where the producer has his principal office or in any district in which he shall do business. It shall be the duty of the various district attorneys, under the direction of the Attorney General of the United States, to prosecute for the recovery of forfeiture.

Sec. 11. State laws regulating the mining of coal not inconsistent with are not affected by this Act.

Sec. 12. Any combination between producers creating a marketing agency for the disposal of competitive coals in interstate commerce or in intra-state commerce directly affecting interstate commerce in which the prices to be determined by such agency, or by the agreement of the producers operating through such agency, shall, after promulgation of the code provided for in section 4, be unlawful as a restraint on interstate trade and commerce within the provisions of the Act of Congress of July 2, 1890, known as the Sherman Act, and Acts amendatory and supplemental thereto, unless such producers have adopted the code provided for in section 4 and shall comply with its provisions.

Subject to the approval of the Commission, a marketing agency may, as to its members, or such marketing agencies may, as between

and among themselves, provide for the cooperative marketing of their coal, at prices not below the effective minimum prices nor above the effective maximum prices prescribed in accordance with section 4: *Provided*, That no such approval shall be granted by the Commission unless it shall find that the agreement under which such agency or agencies propose to function (1) will not unreasonably restrict the supply of coal in interstate commerce, (2) will not prevent the public from receiving coal at fair and reasonable prices, (3) will not operate against the public interest, and (4) that each such agency and its members have agreed to observe the effective marketing regulations and minimum and maximum prices from time to time established by the Commission and otherwise to conduct the business and operations of the agency in conformity with reasonable regulations for the protection of the public interest, to be prescribed by the Commission.

The Commission may, by order, upon complaint of any code member, district board, or member thereof, any State or political subdivision thereof, the consumers' counsel or any other interested person, or on its own motion, suspend or revoke its prior approval of any such marketing agency agreement upon finding that the regulations and orders of the Commission or the requirements of this section have been violated. Unless and until the approval of the Commission is suspended or revoked, neither the agreement creating such marketing agency nor any agreement between such agencies, which has been approved by the Commission, nor any act done in pursuance thereof, by such agency or agencies, or the members thereof, and not in violation of the terms of the Commission's approval, shall be construed to be within the prohibitions of the antitrust laws of the United States.

SEC. 13. If any provision of this Act or the code provided herein, or any section, subsection, paragraph, or proviso, or the application thereof to any person or circumstances, is held invalid, the remainder of this Act or code, and the application thereof to other persons or circumstances, shall not be affected thereby; and if either or any of the provisions of this Act or code relating to prices or unfair methods of competition shall be found to be invalid, they shall be held separable from other provisions not in themselves found to be invalid.

OTHER DUTIES OF THE COMMISSION

SEC. 14. (a) The Commission shall study and investigate the matter of increasing the uses of coal and the problems of its importation and exportation; and shall further investigate—

(1) The economic operations of mines with the view to the conservation of the national coal resources.

(2) The safe operation of mines for the purpose of minimizing working hazards, and for such purpose shall be authorized to utilize the services of the Bureau of Mines.

(3) The problem of marketing to lower distributing costs for the benefit of consumers.

(4) The Commission shall, as soon as reasonably possible after its appointment, investigate the necessity for the control of production of coal and methods of such control, including allotment of

output to districts and producers within such districts and shall hold hearings thereon.

(b) The Commission shall annually report the results of its investigations under this section, together with its recommendations, to the Secretary of the Interior for transmission by him to Congress.

SEC. 15. Upon substantial complaint that coal prices are excessive, and oppressive of consumers, or that any district board, or producers' marketing agency, is operating against the public interest, or in violation of this Act, the Commission may hear such complaint, and its findings shall be made public; and the Commission shall make proper orders within the purview of this Act so as to correct such abuses. The Commission may institute proceedings under this section, and complaints may be made by any State or political subdivision of a State or by the consumers' counsel.

SEC. 16. To safeguard the interests of those concerned in the mining, transportation, selling, and consumption of coal, the Commission or the office of consumers' counsel is hereby vested with authority to make complaint to the Interstate Commerce Commission with respect to rates, charges, tariffs, and practices relating to the transportation of coal, and to prosecute the same. Before proceeding to hear and dispose of any complaint filed by another than the Commission, involving the transportation of coal, the Interstate Commerce Commission shall cause the Commission and the office of consumers' counsel to be notified of the proceeding and, upon application to the Interstate Commerce Commission, shall permit the Commission and consumers' counsel to appear and be heard. The Interstate Commerce Commission is authorized to avail itself of the cooperation, services, records, and facilities of the Commission.

SEC. 17. As used in this Act—

(a) The term "coal" means bituminous coal.

(b) The term "bituminous coal" includes all bituminous, semi-bituminous, and subbituminous coal and shall exclude lignite, which is defined as a lignitic coal having calorific value in British thermal units of less than seven thousand six hundred per pound and having a natural moisture content in place in the mine of 20 per centum or more.

(c) The term "producer" includes all individuals, firms, associations, corporations, trustees, and receivers engaged in the business of mining coal.

(d) The term "interstate commerce" means commerce among the several States and Territories, with foreign nations, and with the District of Columbia.

(e) The term "United States" when used in a geographical sense includes only the States, the Territories of Alaska and Hawaii, and the District of Columbia.

SEC. 18. Section 3 of this Act shall become effective on the first day of the second calendar month after the enactment of this Act, unless the Commission shall not at that time have promulgated the code and forms of acceptance for membership therein, in which event section 3 of this Act shall become effective from and after the date when the Commission shall have promulgated the code and such forms of acceptances, which date shall be promulgated by Executive order of the President of the United States. All other sections,

except section 20 (a), of this Act shall become effective on the day of the approval of this Act.

SEC. 19. This Act shall cease to be in effect (except as provided in section 13 of the Revised Statutes) and any agencies and offices established thereunder shall cease to exist on and after four years from the date of the approval of this Act.

SEC. 20. (a) The Bituminous Coal Conservation Act of 1935 is hereby repealed, but such repeal shall not be effective until the consumers' counsel and a majority of the members of the Commission have been appointed.

(b) There is hereby authorized to be appropriated from time to time such sums as may be necessary for the administration of this Act. All sums heretofore or hereafter appropriated or made available to the National Bituminous Coal Commission and to the consumers' counsel of the National Bituminous Coal Commission established under the Bituminous Coal Conservation Act of 1935 are hereby transferred and made available for the uses and during the periods for which appropriated, in the administration of this Act by the National Bituminous Coal Commission and the office of the consumers' counsel herein created.

(c) The records, property, and equipment of the National Bituminous Coal Commission and the consumers' counsel, respectively, established under the Bituminous Coal Conservation Act of 1935 are hereby transferred to the Commission and the consumers' counsel, respectively, established under this Act.

SEC. 21. This Act may be cited as the Bituminous Coal Act of 1937.

ANNEX TO ACT—SCHEDULE OF DISTRICTS

EASTERN PENNSYLVANIA

District 1. The following counties in Pennsylvania: Bedford, Blair, Bradford, Cambria, Cameron, Centre, Clarion, Clearfield, Clinton, Elk, Forest, Fulton, Huntingdon, Jefferson, Lycoming, McKean, Mifflin, Potter, Somerset, Tioga.

Armstrong County, including mines served by the P. & S. R. R. on the west bank of the Allegheny River, and north of the Conemaugh division of the Pennsylvania Railroad.

Fayette County, all mines on and east of the line of Indian Creek Valley branch of the Baltimore and Ohio Railroad.

Indiana County, north of but excluding the Saltsburg branch of the Pennsylvania Railroad between Edri and Blairsville, both exclusive.

Westmoreland County, including all mines served by the Pennsylvania Railroad, Torrance, and east.

All coal-producing counties in the State of Maryland.

The following counties in West Virginia: Grant, Mineral, and Tucker.

WESTERN PENNSYLVANIA

District 2. The following counties in Pennsylvania: Allegheny, Beaver, Butler, Greene, Lawrence, Mercer, Venango, Washington.

Armstrong County, west of the Allegheny River and exclusive of mines served by the P. & S. R. R.

Indiana County, including all mines served on the Saltsburg branch of the Pennsylvania Railroad north of Conemaugh River.

Fayette County, except all mines on and east of the line of Indian Creek Valley branch of the Baltimore and Ohio Railroad.

Westmoreland County, including all mines except those served by the Pennsylvania Railroad from Torrance, east.

NORTHERN WEST VIRGINIA

District 3. The following counties in West Virginia: Barbour, Braxton, Calhoun, Doddridge, Gilmer, Harrison, Jackson, Lewis, Marion, Monongalia, Pleasants, Preston, Randolph, Ritchie, Roane, Taylor, Tyler, Upshur, Webster, Wetzel, Wirt, Wood.

That part of Nicholas County including mines served by the Baltimore and Ohio Railroad and north.

OHIO

District 4. All coal-producing counties in Ohio.

MICHIGAN

District 5. All coal-producing counties in Michigan.

PANHANDLE

District 6. The following counties in West Virginia: Brooke, Hancock, Marshall, and Ohio.

SOUTHERN NUMBERED 1

District 7. The following counties in West Virginia: Greenbrier, Mercer, Monroe, Pocahontas, Summers.

Fayette County, east of Gauley River and including the Gauley River branch of the Chesapeake and Ohio Railroad and mines served by the Virginian Railway.

McDowell County, that portion served by the Dry Fork branch of the Norfolk and Western Railroad and east thereof.

Raleigh County, excluding all mines on the Coal River branch of the Chesapeake and Ohio Railroad.

Wyoming County, that portion served by the Gilbert branch of the Virginian Railway lying east of the mouth of Skin Fork of Guyandot River and that portion served by the main line and the Glen Rogers branch of the Virginian Railway.

The following counties in Virginia: Montgomery, Pulaski, Wythe, Giles, Craig.

Tazewell County, that portion served by the Dry Fork branch to Cedar Bluff and from Bluestone Junction to Boissevain branch of the Norfolk and Western Railroad and Richlands-Jewell Ridge branch of the Norfolk and Western Railroad.

Buchanan County, that portion served by the Richlands-Jewell Ridge branch of the Norfolk and Western Railroad and that portion of said county on the headwaters of Dismal Creek, east of Lynn Camp Creek (a tributary of Dismal Creek).

SOUTHERN NUMBERED 2

District 8. The following counties in West Virginia: Boone, Clay, Kanawha, Lincoln, Logan, Mason, Mingo, Putnam, Wayne, Cabell. Fayette County, west of, but not including mines of the Gauley River branch of the Chesapeake and Ohio Railroad.

McDowell County, that portion not served by and lying west of the Dry Fork branch of the Norfolk and Western Railroad.

Raleigh County, all mines on the Coal River branch of the Chesapeake and Ohio Railroad and north thereof.

Nicholas County, that part south of and not served by the Baltimore and Ohio Railroad.

Wyoming County, that portion served by Gilbert branch of the Virginian Railway lying west of the mouth of Skin Fork of Guyandot River.

The following counties in Virginia: Dickinson, Lee, Russell, Scott, Wise.

All of Buchanan County, except that portion on the headwaters of Dismal Creek, east of Lynn Camp Creek (tributary of Dismal Creek) and that portion served by the Richlands-Jewell Ridge branch of the Norfolk and Western Railroad.

Tazewell County, except portions served by the Dry Fork branch of Norfolk and Western Railroad and branch from Bluestone Junction to Boissevain of Norfolk and Western Railroad and Richlands-Jewell Ridge branch of the Norfolk and Western Railroad.

The following counties in Kentucky: Bell, Boyd, Breathitt, Carter, Clay, Elliott, Floyd, Greenup, Harlan, Jackson, Johnson, Knott, Knox, Laurel, Lawrence, Lee, Leslie, Letcher, McCreary, Magoffin, Martin, Morgan, Owsley, Perry, Pike, Rockcastle, Wayne, Whitley.

The following counties in Tennessee: Anderson, Campbell, Claiborne, Cumberland, Fentress, Morgan, Overton, Roane, Scott.

The following counties in North Carolina: Lee, Chatham, Moore.

WEST KENTUCKY

District 9. The following counties in Kentucky: Butler, Christian, Crittendon, Daviess, Hancock, Henderson, Hopkins, Logan, McLean, Muhlenberg, Ohio, Simpson, Todd, Union, Warren, Webster.

ILLINOIS

District 10. All coal-producing counties in Illinois.

INDIANA

District 11. All coal-producing counties in Indiana.

IOWA

District 12. All coal-producing counties in Iowa.

SOUTHEASTERN

District 13. All coal-producing counties in Alabama.

The following counties in Georgia: Dade, Walker.

The following counties in Tennessee: Marion, Grundy, Hamilton, Bledsoe, Sequatchie, White, Van Buren, Warren, McMinn, Rhea.

ARKANSAS-OKLAHOMA

District 14. The following counties in Arkansas: All counties in the State.

The following counties in Oklahoma: Haskell, Le Flore, Sequoyah.

SOUTHWESTERN

District 15. All coal-producing counties in Kansas. All coal-producing counties in Texas. All coal-producing counties in Missouri.

The following counties in Oklahoma: Coal, Craig, Latimer, Muskogee, Okmulgee, Pittsburg, Rogers, Tulsa, Wagoner.

NORTHERN COLORADO

District 16. The following counties in Colorado: Adams, Arapahoe, Boulder, Douglas, Elbert, El Paso, Jackson, Jefferson, Larimer, Weld.

SOUTHERN COLORADO

District 17. The following counties in Colorado: All counties not included in northern Colorado district.

The following counties in New Mexico: All coal-producing counties in the State of New Mexico, except those included in the New Mexico district.

NEW MEXICO

District 18. The following counties in New Mexico: Grant, Lincoln, McKinley, Rio Arriba, Sandoval, San Juan, San Miguel, Santa Fe, Socorro.

The following counties in Arizona: Pinal, Navajo, Graham, Apache, Coconino.

All coal-producing counties in California.

WYOMING

District 19. All coal-producing counties in Wyoming.

The following counties in Idaho: Fremont, Jefferson, Madison, Teton, Bonneville, Bingham, Bannock, Power, Caribou, Oneida, Franklin, Bear Lake.

UTAH

District 20. All coal-producing counties in Utah.

NORTH DAKOTA-SOUTH DAKOTA

District 21. All coal-producing counties in North Dakota. All coal-producing counties in South Dakota.

MONTANA

District 22. All coal-producing counties in Montana.

WASHINGTON

District 23. All coal-producing counties in Washington. All coal-producing counties in Oregon.

The Territory of Alaska.

Approved, April 26, 1937.

SUPREME COURT OF THE UNITED STATES.

No. 804.—OCTOBER TERM, 1939.

The Sunshine Anthracite Coal Company, Appellant,
vs.
Mer M. Adkins, as Collector of Internal Revenue for the District of Arkansas.

} Appeal from the District Court of the United States for the Eastern District of Arkansas.

[May 20, 1940.]

Mr. Justice DOUGLAS delivered the opinion of the Court.

The labor provisions of the Bituminous Coal Conservation Act of 1935 (49 Stat. 991) were held unconstitutional by this Court in *Walter v. Carter Coal Co.*, 298 U. S. 228. The Bituminous Coal Act of 1937 (50 Stat. 72) was thereupon enacted. It eliminated those provisions of the earlier Act and made other substantive and structural changes.¹ The basic problem here involved is the constitutionality of the 1937 Act.

That Act provides for the regulation of the sale and distribution of bituminous coal by the National Bituminous Coal Commission² with the cooperation of the bituminous coal industry. Its aim is the stabilization of the industry primarily through price-fixing and the elimination of unfair competition. It is provided in § 4 that the coal producers, accepting membership, shall be organized under the Bituminous Coal Code. Some twenty district boards of code members are provided for, which are to operate as an aid to the commission but subject to its pervasive surveillance and authority. The statute specifies in detail the methods of their organization and operation, the scope of their functions, and the jurisdiction of the commission over them. The Commission is empowered to fix mini-

¹ H. Report No. 294, 75th Cong., 1st Sess., pp. 2-3.

² Though we refer throughout to the Commission, it should be noted that its functions have been administered since July 1, 1939, by the Bituminous Coal Division of the Department of the Interior. Reorganization Plan No. 11, (a) and (b), submitted by the President to the Congress May 9, 1939. Pub. Res. No. 20, 76th Cong., 1st Sess., c. 193, approved June 7, 1939.

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um prices for code members in accordance with stated standards. Under § 4, II(a) each board shall "on its own motion or when directed by the Commission" propose minimum prices pursuant to prescribed statutory standards. These may be approved, disapproved, or modified by the Commission as the basis for the coordination of minimum prices. Somewhat comparable machinery is provided for such coordination of minimum prices "in common consuming market areas upon a fair competitive basis", § 4, II(b), and for establishment of rules and regulations incidental to the sale and distribution of coal by code members, § 4, II(a). The Commission is also given power by § 4, II(c) to establish maximum prices for code members pursuant to standards prescribed herein. The sale, delivery, or offer for sale of coal below the minimum or above the maximum prices established by the Commission is made a violation of the code. § 4, II(e). So are numerous practices, specified in § 4, II(i) as unfair methods of competition. And contracts for the sale of coal at prices below the prescribed minimum or above the maximum are invalid and unenforceable. § 4, II(e). The Commission may, after hearing, revoke the code membership of any coal producer for willful violation of the code or of any regulation made thereunder. § 5(b).

Sec. 3(a) imposes an excise tax of 1 cent per ton of two thousand pounds upon the sale or other disposition by the producer of bituminous coal produced in the United States.³ Sec. 3(b) imposes an additional 19½% tax (based on sale price or in certain cases on fair market value) on sales of bituminous coal by producers "which could be subject to the application of the conditions and provisions of the code provided for in section 4, or of the provisions of section A."⁴ Producers who are members of the code are exempt from that tax. As we shall see, the interpretation of § 3(b) is a subject of controversy. But if, as the government contends, the 19½%

³ These provisions are now found in § 3520 of the Internal Revenue Code. 53 Stat. 430. The 1¢ tax was apparently designed to cover the administrative costs of the Act. See H. Report No. 294, *supra* note 1, pp. 2-3, recommending a ½% tax which in conference was changed to 1¢ per ton. H. Report No. 578, 75th Cong., 1st Sess., p. 5.

⁴ Sec. 4, as we have seen, governs the constitution and operation of the code. Sec. 4 A provides, *inter alia*, that the Commission shall subject coal in intrastate commerce to the provisions of § 4 if it finds after hearing that transactions in that coal "cause any undue or unreasonable advantage, preference, or prejudice as between persons and localities in such commerce on the one hand and interstate coal on the other hand, or any undue, unreasonable, or unjust discrimination against interstate commerce in coal, or in any manner directly affect interstate commerce in coal."

tax is applicable to sales by non-members, there are strong inducements for joining the code.

Machinery is provided in § 4-A for obtaining exemptions. A producer who believes that any commerce in coal is not, or may not be made, subject to the provisions of § 4 may file an application for exemption with the Commission. Subject to qualifications not material here, the filing of such application "in good faith" exempts the applicant from any "obligation, duty or liability" imposed by § 4 pending action by the Commission on the application. The Commission shall grant the application or, after notice and opportunity for hearing, shall deny or otherwise dispose of it. An applicant aggrieved by such denial or other disposition may obtain a review of the order in the Court of Appeals for the District of Columbia or in the Court of Appeals in the circuit where he resides or has his principal place of business. § 6(b). The findings of the Commission as to the facts, if supported by substantial evidence, are conclusive.

Appellant is lessee of coal lands in Arkansas and is engaged in the business of mining and shipping coal. It has not subscribed to or accepted the provisions of the Bituminous Coal Code provided for in § 4 of the Act. In August 1937 it filed an application for exemption on the grounds that its coal was not bituminous coal as defined in § 17(b) of the Act.⁵ The Commission held a public hearing on that application in October 1937.⁶ Appellant appeared, introduced evidence, and was heard on oral argument before the Commission.⁷ In August 1938 the Commission handed down an opinion with findings of fact and conclusions of law and entered an order denying appellant's application for exemption on the grounds that its coal was bituminous within the meaning of § 17(b). Appellant obtained

⁵ Sec. 17(b) provides: "The term 'bituminous coal' includes all bituminous, semibituminous, and subbituminous coal and shall exclude lignite, which is defined as a lignitic coal having calorific value in British thermal units of less than seven thousand six hundred per pound and having a natural moisture content in place in the mine of 30 per centum or more."

⁶ This hearing was not restricted to appellant's application. Other producers in the same field intervened.

⁷ The liberal notice and opportunity to be heard afforded appellant are illustrated by the following: In January 1938 the report of the examiner was served on appellant. In May 1938 a proposed report of the Commission was issued giving appellant 30 days to file exceptions and briefs and in that event to apply for oral argument. Appellant filed exceptions and asked for oral argument. Notice of oral argument was issued and oral argument was had. Thereafter the Commission issued its order denying the application.

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a review of this order in the Circuit Court of Appeals. That court held that the Commission had jurisdiction to determine the status of coal claimed to be exempt and that the Commission's decision was based on substantial evidence. It accordingly affirmed the order. *Sunshine Anthracite Coal Co. v. National Bituminous Coal Commission*, 105 F. (2d) 559. We denied certiorari. 308 U. S. 604.

In May 1938, while the above proceeding was pending before the Commission, appellee demanded that appellant pay the taxes, penalties and interest accruing under § 3(b) of the Act for the period ending February 1938; and filed a notice of tax lien against appellant's property. Thereupon appellant filed its complaint in this suit to enjoin the collection of the tax. A three-judge court was convened, which issued a temporary injunction. Apparently no further action was taken in this case until after the decision of the Circuit Court of Appeals in *Sunshine Anthracite Coal Co. v. National Bituminous Coal Commission*, *supra*, when appellee filed a supplemental answer stating that the decision in that case was *res judicata* as to the status of appellant's coal under the Act and that the district court had no jurisdiction over that subject matter. The court below denied appellant's motion to strike that portion of the answer. 31 F. Supp. 125. The case was tried. The court held the Act to be constitutional and dismissed the bill on the merits.⁸ The case is here on appeal (50 Stat. 752; 28 U. S. C. A. § 330(a)).

I. Appellant argues that it is not subject to the 19½% tax imposed by § 3(b) because that section does not apply to producers who are not members of the code. Its argument rests on the construction of § 3(b) and § 4. As we have seen, the former places the 19½% tax on the sale or other disposition of coal "which would be subject to the application of the conditions and provisions of the code provided for in section 4, or of the provisions of section 4-A." Sec. 4 provides that the "provisions of such code shall apply only to such code members." Appellant therefore contends that the tax is not applicable to its coal, since the coal produced by a non-code producer such as appellant is not subject to the provisions of the code.

⁸ It granted, however, a permanent injunction against collection of taxes prior to December 4, 1939 the date on which this Court denied a petition for rehearing on the petition for certiorari. 308 U. S. 638. Appellee has not appealed from that part of the decree. The Court also granted a stay with respect to collection of taxes accruing after December 4, 1939, pending final disposition of this appeal.

But if the 19½% tax is not applicable to non-code members, it is not applicable to anyone since § 3(b) exempts code members from that tax. That construction would read the 19½% tax out of the Act. The essential sanction of the Act would then disappear and its effectiveness would be seriously impaired. That alternative will not be taken where a construction is possible which will preserve the vitality of the Act and the utility of the language in question. See *Armstrong Paint & Varnish Works v. Nu-Enamel Corp.*, 305 U. S. 315, 333 and cases cited. Only a highly strained construction of § 3(b) would lead to the conclusion that non-code members are exempt from the 19½% tax. It seems that Congress made a deliberate choice of words when it said that the tax applied to the sale or other disposition of coal which "would be" subject to § 4 and § 4-A. Sec. 4 is made expressly applicable "only to matters and transactions in or directly affecting interstate commerce in bituminous coal." Hence it seems plain that the tax was intended to apply only to those sales by non-code members which "would be" subject to regulation under § 4. Appellant's coal plainly falls in that class since practically its entire output is sold to purchasers outside the state of Arkansas. To sustain appellant's position we would not only have to substitute "is" for "would be"; we would have to override the express Congressional plan to make the 19½% tax "in aid of the regulation of interstate commerce" in bituminous coal. That would be not only to rewrite § 3(b) but to remake the whole statutory scheme. Obviously such a task is not for the courts.

II. Appellant challenges the constitutionality of the Act on the grounds that the 19½% tax is not a tax but a penalty, that Congress lacks the power to fix minimum prices for bituminous coal sold in interstate commerce, that there has been an invalid delegation of legislative and judicial power, and that the division of bituminous coal into code and non-code classes is improper.

Clearly this tax is not designed merely for revenue purposes. In purpose and effect it is primarily a sanction to enforce the regulatory provisions of the Act. But that does not mean that the statute is invalid and the tax unenforceable. Congress may impose penal-

⁹H. Report, No. 294, *supra* note 1, states concerning this tax (p. 4): "Under subsection (b) a tax of 19½ percent is applied to coal which would be subject to the provisions in section 4 or the provisions of section 4A. Producers who are code members are exempt from this tax. This tax is intended to be in aid of the regulation of interstate commerce in coal provided for in sections 4 and 4A."

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ties in aid of the exercise of any of its enumerated powers. The power of taxation, granted to Congress by the Constitution, may be utilized as a sanction for the exercise of another power which is granted it. *Head Money Cases*, 112 U. S. 580, 596. And see *Sonzinsky v. United States*, 300 U. S. 506. It is so utilized here.

The regulatory provisions are clearly within the power of Congress under the commerce clause of the Constitution. These provisions are applicable only to sales or transactions in, or directly or intimately affecting, interstate commerce. "The fixing of prices, the proscription of unfair trade practices, the establishment of marketing rules respecting such sales of bituminous coal constitute regulations within the competence of Congress under the commerce clause. As stated by Mr. Justice Cardozo in his dissent in *Carter v. Carter Coal Co.*, *supra*, p. 326, "To regulate the price for such transactions is to regulate commerce itself, and not alone its antecedent conditions or its ultimate consequences." See *Tagg Bros. & Moorhead v. United States*, 280 U. S. 420. What is true of prices is true of the attachment of other conditions to the flow of a commodity in interstate channels. *Mulford v. Smith*, 307 U. S. 38 and cases cited. Since this power when it exists is complete in itself, *Gibbons v. Ogden*, 9 Wheat. 1, 196, there can be no question but that the provisions of this Act are an exertion of the paramount federal power over interstate commerce. See *United States v. Rock Royal Co-operative, Inc.*, 307 U. S. 533.

Nor does the Act violate the Fifth Amendment. Price control is one of the means available to the states (*Nebbia v. New York*, 291 U. S. 502) and to the Congress (*United States v. Rock Royal Co-operative, Inc.*, *supra*) in their respective domains (*Baldwin v. F. A. F. Seelig, Inc.*, 294 U. S. 511) for the protection and promotion of the welfare of the economy. But appellant claims that this Act is not an appropriate exercise of the Congressional power. It argues that the nature and use of bituminous coal in nowise endangers the health and morals of the populace; that no question of conservation is involved; that the ills of the industry are attributable to overproduction; that the increase of prices will cause a further loss of markets and add to the afflictions which beset the industry; and that the consuming public will be deprived of the wholesome restriction of the anti-trust laws. Those matters, however, relate to questions of policy, to the wisdom of the legislation, and to the ap-

propriateness of the remedy chosen—matters which are not our concern. If we endeavored to appraise them we would be trespassing on the legislative domain. And if we undertook to narrow the scope of federal intervention in this field, as suggested by appellant, we would be blind to at least thirty years of history. For a generation there have been various manifestations of incessant demand for federal intervention in the coal industry.¹⁰ The investigations preceding the 1935 and 1937 Acts are replete with an exposition of the conditions which have beset that industry.¹¹ Official¹² and private¹³ records give eloquent testimony to the statement of Mr. Justice Cardozo in the *Carter* case (p. 330) that free competition had been “degraded into anarchy” in the bituminous coal industry. Overproduction and savage, competitive warfare wasted the industry. Labor and capital alike were the victims. Financial distress among operators and acute poverty among miners prevailed even during periods of general prosperity. This history of the bituminous coal industry is written in blood as well as in ink.

It was the judgment of Congress that price-fixing and the elimination of unfair competitive practices were appropriate methods for prevention of the financial ruin, low wages, poor working conditions, strikes, and disruption of the channels of trade which followed in the wake of the demoralized price structures in this industry. If the strategic character of this industry in our economy and the chaotic conditions which have prevailed in it do not justify legislation, it is difficult to imagine what would. To invalidate this Act we would have to deny the existence of power on the part of Congress under the commerce clause to deal directly and specifically with those forces which in its judgment should not be permitted to dislocate an important segment of our economy and to disrupt and burden interstate channels of trade. That step could

¹⁰ National Resources Committee, *Energy Resources and National Policy* (1939) pp. 41-123, 338-346, 405-423.

¹¹ Hearings on H. R. 8479, 74th Cong., 1st Sess.

¹² National Resources Committee, *Energy Resources and National Policy*, *supra* note 10; H. Rep. No. 1800, 74th Cong., 1st Sess., covering the 1935 Act; S. Rep. No. 252, H. Rep. No. 294, 75th Cong., 1st Sess., covering the 1937 Act; *Appalachian Coals, Inc. v. United States*, 288 U. S. 344; Third Annual Report Under the Bituminous Coal Act of 1937 (1940) pp. 4-5.

¹³ Hamilton & Wright, *The Case of Bituminous Coal* (1926); Report of the Fifteenth Annual Meeting of the National Coal Assoc., Oct. 1934, pp. 9-11, 96-97.

not be taken without plain disregard of the Constitution. There are limits on the powers of the states to act as respects these interstate industries. *Baldwin v. G. A. F. Seelig, Inc.*, *supra*. If the industry acting on its own had endeavored to stabilize the markets through price-fixing agreements, it would have run afoul of the Sherman Act. *United States v. Socony-Vacuum Oil Co., Inc.*, 309 U. S. —. But that does not mean that there is a no man's land between the state and federal domains. Certainly what Congress has forbidden by the Sherman Act it can modify. It may do so by placing the machinery of price-fixing in the hands of public agencies. It may single out for separate treatment, as it has done on various occasions,¹⁴ a particular industry and thereby remove the penalties of the Sherman Act as respects it. Congress under the commerce clause is not impotent to deal with what it may consider to be dire consequences of laissez-faire. It is not powerless to take steps in mitigation of what in its judgment are abuses of cut-throat competition. And it is not limited in its choice between unrestrained self-regulation on the one hand and rigid prohibitions on the other. The commerce clause empowers it to undertake stabilization of an interstate industry through a process of price-fixing which safeguards the public interest by placing price control in the hands of its administrative representative. *United States v. Rock Royal Co-operative, Inc.*, *supra*. That was the choice which Congress made here. There is nothing in the *Carter* case which stands in the way. The majority of the Court in that case did not pass on the price-fixing features of the earlier Act. The Chief Justice and Mr. Justice Cardozo in separate minority opinions expressed the view that the price-fixing features of the earlier Act were constitutional. We rest on their conclusions for sustaining the present Act.

Nor does the Act contain an invalid delegation of legislative power. Under § 4, II(c) the Commission may fix maximum prices when in the public interest it deems it necessary in order to protect the consumer against unreasonably high prices. These maximum prices must be fixed at a uniform increase above minimum prices so that in the aggregate they will yield a reasonable return above the weighted average total cost of the district. And no maximum price shall be established for any mine which will not yield a fair return on the fair value of the property. The minimum prices to

¹⁴ See *United States v. Socony-Vacuum Oil Co., Inc.*, *supra*, p. —.

be fixed must conform to the following standards: the weighted average cost for each minimum price area must be computed, the elements of cost being defined; a classification of the various sizes and grades of coal shall be made which reflects as nearly as possible the relative market value of the various kinds, qualities, and sizes of coal, which is just and equitable as between producers within the district and which has due regard to the interests of the consuming public; and coordinated minimum prices shall be established for such coal (a) which reflect as nearly as possible the relative market values at points of delivery taking into account specifically enumerated factors, (b) which preserve as nearly as may be existing fair competitive opportunities, (c) which are just and equitable as between the districts, and (d) which, consistently with the process of coordination, yield a return to each area approximating its weighted average cost per ton.

The problem of fixing reasonable prices for bituminous coal cannot be differentiated legally from the task of fixing rates under the Interstate Commerce Act (41 Stat. 484, 49 U. S. C. A. § 15) and the Packers and Stockyards Act (42 Stat. 166, 7 U. S. C. A. § 211). The latter provide the standard of "just and reasonable" to guide the administrative body in the rate-making process. The validity of that standard (*Tagg Bros. & Moorhead v. United States, supra*), the appropriateness of the criterion of the "public interest" in various contexts (*New York Central Securities Corp. v. United States*, 287 U. S. 12, 24; *United States v. Chemical Foundation, Inc.*, 272 U. S. 1; *Arcot v. United States*, 266 U. S. 127), the legality of the standard of "unreasonable obstruction" to navigation (*Union Bridge Co. v. United States*, 204 U. S. 364) all make it clear that there is a valid delegation of authority in this case. The standards which Congress has provided here far exceed in specificity others which have been sustained. Certainly in the hands of experts the criteria which Congress has supplied are wholly adequate for carrying out the general policy and purpose of the Act. To require more would be to insist on a degree of exactitude which not only lacks legal necessity but which does not comport with the requirements of the administrative process. Delegation by Congress has long been recognized as necessary in order that the exertion of legislative power does not become a futility. *Currin v. Wallace*, 306 U. S. 1, 15 and cases cited. But the effectiveness of both the

legislative and administrative processes would become endangered if Congress were under the constitutional compulsion of filling in the details beyond the liberal prescription here. Then the burdens of minutiae would be apt to clog the administration of the law and deprive the agency of that flexibility and dispatch which are its salient virtues. For these reasons we hold that the standards with which Congress has supplied the Commission are plainly valid. *United States v. Rock Royal Co-operative, Inc., supra*.

Nor has Congress delegated its legislative authority to the industry. The members of the code function subordinately to the Commission. It, not the code authorities, determines the prices. And it has authority and surveillance over the activities of these authorities. Since law-making is not entrusted to the industry, this statutory scheme is unquestionably valid. *Currin v. Wallace, supra*, and cases cited.

But appellant maintains that the delegation of authority to the Commission to determine what coal is subject to the Act is unlawful because of uncertainty in the statutory definition of bituminous coal. Sec. 17(b) defines the term "bituminous coal" as follows:

"The term 'bituminous coal' includes all bituminous, semibituminous, and subbituminous coal and shall exclude lignite, which is defined as a lignitic coal having calorific value, in British thermal units of less than seven thousand six hundred-per pound and having a natural moisture content in place in the mine of 30 per centum or more."

As in the case of the term "interurban" electric railway in the Railway Labor Act (*Shields v. Utah Idaho Central Railroad Co.*, 305 U. S. 177) we think the definition of bituminous coal is wholly adequate as a standard for administrative action. The fact that it is not a chemist's or an engineer's definition is not fatal. The definition is not devoid of meaning. We are unable to say that it cannot be applied so as to delineate the areas in which Congress intended to make this system of control effective. The fact that many instances may occur where its application may be difficult is merely to emphasize the nature of the administrative problem and the reason for the grant of latitude by the Congress. The difficulty or impossibility of drawing a statutory line is one of the reasons for supplying merely a statutory guide. Cf. *Piedmont & Northern Railway Co. v. Interstate Commerce Commission*, 286 U. S. 299, 312.

That guide is sufficiently precise for an intelligent determination of the ultimate questions of fact by experts.

Nor is there an invalid delegation of judicial power. To hold that there was would be to turn back the clock on at least a half century of administrative law. The question of whether or not appellant should be subjected to the regulatory provisions of the Bituminous Coal Act was one which the Congress could decide in the exercise of its powers under the commerce clause. In lieu of making that decision itself, it could bring to its aid the services of an administrative agency. And it could delegate to that agency the determination of the question of fact whether a particular coal producer fell within the Act. *Shields v. Utah Idaho Central Railroad Co.*, *supra*, p. 180. The fact that such determination involved an interpretation of the term "bituminous coal" is of no more significance here than was the fact that in the *Shields* case a decision by the Interstate Commerce Commission of what constituted an "interurban" electric railway was necessary for the ultimate finding as to the applicability of the Railway Labor Act to carriers. That problem involves no more than the adequacy of the standard governing the exercise of the delegated authority. Furthermore, on this phase of the case, appellant has received all the judicial review to which it is entitled. As we have seen, it obtained a review under § 6(b) of the Commission's denial of its application for exemption. The functions of the courts cease when it is ascertained that the findings of the Commission meet the statutory test. *Rochester Telephone Corp. v. United States*, 307 U. S. 125, 146.

Appellant contends that the statutory classification of coal into code and non-code classes and the application of the 19½% tax to the latter are improper under the Fifth Amendment. Its objection is not premised on lack of due process. Nor could it be in view of the elaborate machinery and procedure for the Act's enforcement which the Congress has provided. Rather appellant's objection is founded on its claim of discrimination. But the Fifth Amendment, unlike the Fourteenth, has no equal protection clause. *Steward Machine Co. v. Davis*, 301 U. S. 548, 584 and cases cited. And there is "no requirement of uniformity in connection with the commerce power." *Curran v. Wallace*, *supra*, p. 14. The lack of similarity in treatment of the two classes of coal is an integral and essential feature of this Act. As we have said, it is through that de-

vice that Congress sought to obtain an effective sanction for the Act's enforcement. Coercion is the very essence of any penalty exacted for failure of submission. "It is of the essence of the plenary power conferred" by the commerce clause "that Congress may exercise its discretion in the use of the power." *Currin v. Wallace*, *supra*, p. 14. A part of that discretion is the selection of the sanction for the law's enforcement. Discrimination constitutionally may be the price of non-compliance. "Inquiry into the hidden motives which may move Congress to exercise a power constitutionally conferred upon it is beyond the competency of courts." *Squinzsky v. United States*, *supra*, pp. 513-514. And see *Mulford v. Smith*, *supra*, p. 48.

III. Appellant contends here, as it did below, that *Sunshine Anthracite Coal Co. v. National Bituminous Coal Commission* *supra*, is not determinative of the present issues since that case did not involve the assessment of taxes and since the Commission had no authority to determine the status of appellant's coal.

These contentions are untenable. In the first place, the Commissioner of Internal Revenue is merely the agency to collect taxes levied under the Act; he is not the administrative agent whom Congress has designated to determine what coal is exempt from the 19½% tax. That function is entrusted to the Commission. By the terms of § 4-A it is the Commission which determines whether an application for exemption should be granted or denied. By the provisions of § 3(b) it is the Commission which certifies to the Commissioner those who are code members and consequently exempt from the 19½% tax. Hence the Commission determines the scope of the provisions of the Act and their applicability to various producers. The Commissioner is given no administrative functions whatsoever except tax collection. In the second place, the underlying issue in each of these two suits is the same. In *Sunshine Anthracite Coal Co. v. National Bituminous Coal Commission*, *supra*, the question was whether or not appellant's coal was "bituminous" within the meaning of § 17(b). When that issue was decided adversely to appellant, liability for the 19½% tax followed unless appellant joined the code, in which event it would be entitled to a certificate from the Commission evidencing its tax exemption. In the present suit, appellant is seeking to raise the identical issue, since its purpose is to enjoin collection of the self-same tax.

The result is clear. Where the issues in separate suits are the same, the fact that the parties are not precisely identical is not necessarily fatal. As stated in *Chicago, Rock Island & Pacific Railway Co. v. Schendel*, 270 U. S. 611, 620, "Identity of parties is not a mere matter of form, but of substance. Parties nominally the same may be, in legal effect, different, . . . and parties nominally different may be, in legal effect, the same." A judgment is *res judicata* in a second action upon the same claim between the same parties or those in privity with them. *Cromwell v. County of Sac*, 94 U. S. 351. There is privity between officers of the same government so that a judgment in a suit between a party and a representative of the United States is *res judicata* in relitigation of the same issue between that party and another officer of the government. See *Tait v. Western Maryland Railway Co.*, 289 U. S. 620. The crucial point is whether or not in the earlier litigation the representative of the United States had authority to represent its interests in a final adjudication of the issue in controversy. Cf. *Gunter v. Atlantic Coast Line Railroad Co.*, 200 U. S. 273, 284-289. Cases holding that a judgment in a suit against a collector for unlawful exaction is not a bar to a subsequent suit by or against the Commissioner or the United States (*Sage v. United States*, 250 U. S. 33; *Bankers Pocahontas Coal Co. v. Burnet*, 287 U. S. 308) are not in point, since the suit against the collector is "personal and its incidents, such as the nature of the defenses open and the allowance of interest, are different." *Sage v. United States*, *supra*, p. 37. But here the authority of the Commission is clear. There can be no question that it was authorized to make the determination of the status of appellant's coal under the Act. It represented the United States in that determination and the delegation of that power to the Commission was valid, as we have said. That suit therefore bound the United States, as well as the appellant. Where a suit binds the United States, it binds its subordinate officials. *Tait v. Western Maryland Railway Co.*, *supra*. The suggestion that the doctrine of *res judicata* does not apply unless the court rendering the judgment had jurisdiction of the cause is sufficiently answered by *Stell v. Gottlieb*, 305 U. S. 165 and *Tretnies v. Sunshine Mining Co.*, 308 U. S. 66. As held in those cases, in general the principles of *res judicata* apply to questions of jurisdiction as well as to other matters—whether it be jurisdiction of the subject matter or of the parties. Accordingly

the lower court correctly held that it had no jurisdiction to determine whether appellant's coal was "bituminous" as defined in the Act. Furthermore where, as here, Congress has created a special administrative procedure for the determination of the status of persons or companies under a regulatory act and has prescribed a procedure which meets all requirements of due process, that remedy is exclusive. See *Anniston Manufacturing Co. v. Davis*, 301 U. S. 337.

The decree below subjected appellant to payment of taxes accrued or assessed against it under § 3(b) after December 4, 1939. To relieve against payment of taxes until final termination of the litigation would be to put a premium on dilatory tactics in a situation where under the authority of *Curran v. Wallace*, *Mulford v. Smith*, and *United States v. Rock Royal Co-operative, Inc.*, *supra*, the subject of the Act was clearly one over which the jurisdiction of Congress was complete.

Affirmed.

Mr. Justice McREYNOLDS is of opinion that the Act under review is beyond any power granted to Congress and that the judgment below should be reversed.

A true copy.

Test :

Clerk, Supreme Court, U. S.

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